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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~418.~~ 192

GEORGE I. LAMMON, WILLIAM SHARON, J. W. MACKAY, AND F. A. TRITLE, PLAINTIFFS IN ERROR,

vs.

LOUIS FEUSIER AND ADOLPH BRUGIER, EXECUTORS OF HENRY FEUSIER, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEVADA.

FILED NOVEMBER 4, 1880.

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1 In the circuit court of the United States for the district of Nevada.

HENRY FEUSIER, SR., PLAINTIFF,
vs.
GEORGE I. LAMMON, WM. SHARON, J. W. MACKAY, and F. A. TRITLE, defendants.

Henry Feusier, sr., who is a citizen of the State of California, plaintiff in this suit, complains of George I. Lammon, William Sharon, J. W. Mackay, and F. A. Tritle, defendants in this suit, who are all citizens of the State of Nevada, and shows:

1. That on or about the 16th day of April, A. D. 1869, the defendant Lammon was duly appointed by the President of the United States to be marshal of the United States for the district of Nevada for the period of four years from the day and year aforesaid unless sooner
2 removed from such office.

2d. That before entering upon the duties of his said office, he, the defendant Lammon, as principal, and the defendants Sharon, Mackay, and Tritle, as sureties, duly made and delivered to the United States their certain bond in writing, under their hands and seals, to wit, on the 2d day of June, A. D. 1869, and thereby bound themselves jointly and severally to the United States of America in the penal sum of twenty thousand dollars, with a condition thereunder written, whereby, after reciting that the President of the United States had, pursuant to law, appointed the said Lammon to be marshal of the United States for the district of Nevada, to have and to hold said office, with all the rights, privi-
3 leges, and emoluments thereunto lawfully appertaining, for four years from the 16th day of April, A. D. 1869, unless sooner removed therefrom, as by a commission to him bearing date the 16th day of April, A. D. 1869, more fully appeared, it was provided that if said Lammon, by himself and his deputies, should faithfully perform all the duties of the said office of marshal, then said obligation was to be void; otherwise in full force and virtue; a copy of which bond is hereunto annexed and made a part hereof. That said bond was duly approved by the district judge of the United States for the district of Nevada, on the 2d day of June, A. D. 1869, and was at the time of its execution duly stamped.

That the said Lammon duly took the oath of office required by the statute of the United States in such case made and provided, and
4 thereupon entered upon the discharge of his duties as such marshall, and ever since has been the duly qualified and acting marshal of the United States for the district aforesaid.

3. That on the 28th day of March, A. D. 1870, at the time of the seizure of the goods and chattels hereinafter mentioned, the plaintiff was, and since the 21st day of February, A. D. 1870, had been, the owner of and in the lawful possession of all the stock of goods, wares, and merchandise; consisting of groceries, provisions, liquors, hardware, mining tools, and general merchandise, and, also, one Tilton and McFarland iron safe, with the contents thereof, consisting among other things of about seven hundred dollars in money, situate and being on the said 28th day of March,

A. D. 1870, in that certain building or store, No. 126, west side of Main street, in the town of Hamilton, State of Nevada, of the value in the aggregate of $3,000.00 in gold coin of the United States.

4. That on the 28th day of March, A. D. 1870, one M. Mauseau commenced an action in this court against one E. D. Feusier to recover the sum of seven thousand five hundred and seven dollars in gold coin, besides interest claimed to be due from said E. D. Feusieur to him, said M. Mauseau, upon contract, besides costs, and that on said day the said Mauseau caused a certain writ of attachment to be issued out of this court in said action directed to the said marshal of the United States for the district of Nevada, (the defendant Lammon) commanding him to attach and safely keep all the property of the said E. D. Feusier, within said district, not exempt from execution, or so much thereof as might be sufficient to satisfy the aforesaid demand of said Mauseau, to wit, the said sum of $7,507.00, in gold coin, unless the said E. D. Feusieur should give him security by the undertaking of at least two sufficient sureties in an amount sufficient to satisfy said demand, besides costs, in gold coin, in which case to take said undertaking.

5. That said writ was, on the said 28th day of March, A. D. 1870, delivered to the said marshal, by the delivery thereof to Henry A. Van Pragg, who then, and at the time of seizure and detention of the goods and chattels herinafter mentioned, was the deputy marshal of the United States for said district, duly appointed by said Lammon, qualified and acting, and that under and by virtue of the said writ, the defendant, Lammon, marshal, &c., on the said last-mentioned day, by his deputy aforesaid, assisted by one M. Buxbaum, an employé of the defendant Lammon, for the purpose, wrongfully and unlawfully, and in violation of his duty, as such marshal, attached, levied on, seized and took into his custody, all of the aforesaid goods, wares, and merchandise, and safe with its contents, in said store, as and for the property of the said E. D. Feusier.

6. That afterwards, and on the said last-mentioned day, the plaintiff in this suit commenced his action in the district court of the 8th judicial district of the State of Nevada for said White Pine County against the said Lammon, Van Pragg, and Buxbaum, for the recovery from them of the possession of the goods, wares, and merchandise, and the safe, with its contents, so wrongfully taken as aforesaid.

7. That in said action said plaintiff, pursuant to the statute of the State of Nevada in such case provided, caused, immediately after the commencement thereof, to be delivered to the sheriff of the county of White Pine aforesaid an affidavit made on his behalf by his agent, Louis Feusier, showing, among other things, in substance, that said plaintiff was the owner of said property, and lawfully entitled to the possession of the same. That the same was wrongfully detained by the defendants in said action, and that the alleged cause of such detention, according to the best knowledge, information, and belief of said affiant, was that said property was claimed to be the property of E. D. Feusier, and had been seized under an attachment issued from the circuit court of the United States, 9th circuit, district of Nevada, in a suit of M. Mauseau against said E. D. Feusier, and that said property had not been taken for a tax, assessment, or fine, pursuant to a statute, or seized under an execution or an attachment

against the property of this plaintiff, and that the actual value of said property was in gold coin $3,000.00. And also at the same time, pursuant to said statute of the State of Nevada, this plaintiff caused to be de-
10 livered to said sheriff a written undertaking, executed by Louis Feusier and A. Wagner, which was then and there approved by the said sheriff, to the effect that they were bound to the defendants in said last-mentioned action in the sum of $6,000.00, gold coin of the United States, being double the value of said property as stated in said affidavit, for the prosecution of the said action for the return of said property to the defendants therein, if return thereof should be adjudged, and for the payment to them of such sum as might from any cause be recovered against this plaintiff in the gold coin aforesaid.

8. That the sheriff, in compliance with the requisitions of this plaintiff's attorneys in said action, endorsed upon said affidavit, took
11 the said goods, wares, and merchandise, and safe, with its contents, from the defendants in this action, and thereafter the same were delivered by him to this plaintiff.

9. That the defendants in the said action answered therein, setting up among other things by way of defence that the said chattels were taken by them, as such marshal, deputy marshal, and assistant as aforesaid, under and by virtue of the aforesaid writ of attachment as the property of the said E. D. Feusier, and were not the property of this plaintiff, but the property of E. D. Feusier, and claiming a return thereof to them, or in case a return thereof could not be had, the sum of $5,000.00, in gold coin
12 of the United States, the value thereof alleged by them.

10. That the said action came on to be tried by the district court before a jury, and this plaintiff having adduced evidence touching his right of property in said chattels, and it having been admitted by him and the defendants in the action that the said goods and chattels had been taken by the said Lammon as marshal aforesaid by his said deputy, Van Pragg, under and by virtue of the aforesaid writ of attachment as the property of the said E. D. Feusier, and that said Buxbaum, upon such taking, was the keeper of said marshal in holding the possession of the said chattels for him, said marshal, and that said marshal by his deputy and keeper
13 was holding said chattels under and by virtue of said writ of attachment when said action was commenced, and that for such taking and holding of said goods and chattels by the defendants in the action, as such marshal, deputy marshal, and keeper, under and by virtue of said writ, the action was brought, and that the value of said goods and chattels was $3,000.00, in gold coin of the United States; thereupon said court instructed said jury that if they believed from the evidence that the defendants in the action took and held the goods in dispute, as marshal, deputy marshal, and keeper, under and by virtue of the writ of attachment aforesaid, they must find a verdict for the defendants and fix the value of said goods at $3,000.00, gold coin aforesaid; and the said jury thereupon returned
14 a verdict for the defendants in the action, assessing the value of the property at $3,000.00, in gold coin aforesaid, and declaring said defendants entitled to a return of said property. That in accordance with said verdict judgment was entered in said district court on the 14th day of May, A. D. 1870, whereby it was adjudged that the defendants in the action recover of this plaintiff the possession of the said chattels or $3,000.00

in gold coin aforesaid in case a delivery thereof could not be had, together with costs of suit, $30\frac{65}{100}$.

11. That after the delivery of the said goods and chattels to this plaintiff as aforesaid he sold all thereof other than money and converted the same into cash.

15 12. That the question of the right of property in or of the title to said goods, wares, merchandise, or safe, or the contents of such safe, was not involved or determined in the said action, and that the only question that was involved in or determined by the verdict of the jury or the judgment of the court thereon rendered was whether or not the said goods, wares, merchandise, and safe, with its contents, had been taken and were held by the defendants in the action under and by virtue of a valid process, or writ of attachment issued out of this court in said action, and for that reason the said district court, by its said instruction, excluded from the consideration of said jury all evidence respecting this plaintiff's title to said property.

16 13. That this plaintiff took an appeal in due form from the said judgment to the supreme court of the State of Nevada, which last-mentioned court rendered its decision, affirming said judgment, holding that the said writ of attachment was a complete defense to the said action, and gave the defendants therein the absolute right to hold the property seized under said writ, against the process in said action, and all and any writs issued from the courts of said State, and that such defense was the only defense which such courts should require on behalf of the marshal of the United States, and that it was not only proper, but it was the duty of the said district court to exclude from the case all consider-

17 ations and evidence respecting the title of this plaintiff to the said property, and that said district court had the power to render a judgment for the return of the said property to the defendants in the action, inasmuch as it had the right to extend its inquiry so far as to ascertain whether or not the said marshal held the property under valid process from this court.

14. That afterwards, and on or about the first day of Dec'r, A. D. 1871, the defendant Lammon, in further violation of his duty as said marshal, caused a writ of execution to be issued upon the judgment of the said district court, directed to the sheriff of the county of Storey, commanding

18 him to deliver the said property to the defendants in said action, and to satisfy the costs therein, and also, in case a delivery of the said property could not be had, the said sum of three thousand dollars in the gold coin aforesaid, out of the personal property of this plaintiff, and if sufficient personal property could not be found, then out of the real property of said plaintiff in said county of Storey.

15, That this plaintiff was the owner at and before the issuance of said execution, and ever since has been the owner of real property in said county of Storey, much more than sufficient to have satisfied the judgment aforesaid. That the said Lammon, and the said sheriff, under his

19 instructions, were threatening to enforce said writ by a levy upon said real property, and this plaintiff being unable to deliver the said goods and chattels to said Lammon, or said sheriff, and in order to save said property from levy and sale under such writ, to wit, on the 8th day of December, A. D. 1871, was obliged to pay, and did pay under pro-

test to the said sheriff, for the use of the said Lammon, the sum of thre thousand ($3,000) dollars in gold coin of the United States, the value of the said property, besides the sum of sixty-five $\frac{15}{100}$ ($65.15) dollars costs, which said sums the sheriff thereupon paid over to the said Lammon, and which the said Lammon wrongfully and unlawfully, and in violation of his duty as such marshal, converted to his own use.

16. That by reason of the premises this plaintiff has been injured to his loss and damage in the sum of three thousand and sixty-five $\frac{15}{100}$ dollars.

That the plaintiff has demanded of said Lammon to pay him back the said sum of three thousand and sixty-five $\frac{15}{100}$ dollars, but he has refused, and still refuses to pay the same, or any part thereof.

Wherefore the plaintiff prays judgment against the defendants for the said sum of three thousand & sixty-five $\frac{15}{100}$ dollars, with interest thereon from the time of the payment thereof to said sheriff, as aforesaid, until paid, and costs of suit.

WILLIAMS & BIXLER,
Att'ys for Plaintiff.

(Endorsed:) Circuit court of the United States, district of Nevada. Henry Feusier, sr., plaintiff, vs. George I. Lammon et als. defendants. Complaint. Filed M'ch 17, 1879. T. J. Edwards, clerk. Williams and Bixler, att'ys for pl'ff.

In the circuit court of the United States for the district of Nevada.

HENRY FEUSIER, SR., PLAINTIFF,
vs.
GEORGE I. LAMMON, WILLIAM SHARON, J. W. Mackey, and F. A. Tritle, defendants.

And now come the defendants in this action and for answer to the complaint herein filed against them deny each and every allegation in said complaint contained.

And for a further answer and defense in this action, these defendants aver and show that heretofore, to wit, on the 14th day of May, A. D. 1870, at Hamilton, in White Pine County, State of Nevada, in an action then pending in the district court of the eighth judicial district of the State of Nevada in and for the said county of White Pine, having jurisdiction thereof between this plaintiff as plaintiff therein and the said defendant Lammon as defendant therein, with Henry A. Van Pragg, deputy marshal, and M. Buxbaum, his assistant, under said Lammon as United States marshal for the district of Nevada, as codefendants of said Lammon therein, and for the same cause of action as that set forth against the said Lammon in the complaint herein as to all the property therein mentioned as seized under attachment, except the contents of safe therein mentioned, judgment was duly rendered against the said plaintiff and in favor of the defendants therein, to the effect that the defendants recover of the plaintiff, to whom the property in controversy therein had been delivered previously under process in the same action, the possession of the said property or the sum of three thousand dollars, in gold coin of the United States, as the value thereof, in case a delivery thereof could not be

had, and also $66.65, the defendants' costs of that action; which judgment still remain in full force and effect and not in the least reversed or made void; and these defendants now here plead the same in bar of the cause of action alleged against them by the said plaintiff in his complaint herein.

And for a further answer and defense in this action, these defendants aver and show that heretofore, to wit, on the 9th day of August, A. D. 1871, at Carson City, in Ormsby County and district, and State of Nevada, in a suit then and there pending in this court on the equity side thereof, and having jurisdiction therein, between this plaintiff as complainant therein and the said defendant Lammon as sole defendant therein, and for the same cause of action as that set forth against the said Lammon in the complaint herein, the decree of this court upon the equity side thereof was duly rendered and entered against the said plaintiff and in favor
25 of the said defendant Lammon, to the effect that the said complainant's bill of complaint be dismissed, and that the said defendant Lammon recover his costs therein of and from the said complainant, which decree still remains in full force and effect and not in the least reversed or made void, and these defendants now here plead the same in bar of the cause of action alleged against them by the said plaintiff in his complaint herein.

Wherefore these defendants pray judgment in their favor, that the plaintiff take nothing by this action, and that they have and recover of and from him their costs and disbursements herein.

Dated May 9, 1872.

MESIEK & WOOD,
Attorneys for Defendants.

(Endorsed:) Circuit court of the United States, district of Nevada. Henry Feusier, sr., vs. George I. Lammon et als. Copy. Answer of defendants. Filed M'ch 17, 1879. T. J. Edwards, clerk.

26 In the circuit court of United States, district of Nevada.

LOUIS FEUSIER AND ADOLPH BRUGIER, EXECUTORS of Henry Feusier, sr., deceased, plaintiffs,
vs.
GEORGE I. LAMMON ET ALS., DEFENDANTS.

It is hereby stipulated that the annexed complaint and answer be and the same are hereby substituted in lieu of the original complaint and answer in the above-entitled action, accidentally destroyed by fire, with the same force and effect as said originals, and filed in said action, being the same action in which the plaintiff having died after the commencement thereof, his executors were substituted as plaintiffs.

WILLIAMS AND BIXLER AND
M. N. STONE, *Att'ys for Pl'ffs.*
27 R. S. MESIEK, *Att'y for Defendants.*

(Endorsed:) U. S. circuit c't, dist. of Nevada. Louis Feusier & A. Brugier, executors, vs. Geo. I. Lammon, et al. Stipulation. Filed M'ch 17, 1879. T. J. Edwards, clerk.

Minutes of court.—October 11, 1875.

HENRY FEUSIER, SEN'R,
vs.
GEO. I. LAMMON ET ALS.

On motion and by consent of counsel for the parties, ordered that Louis Feusier, sen'r, and Adolph Bourgier, executors of the plaintiff, now deceased, be and they are hereby substituted as plaintiffs herein, and that the action be continued in their names as plaintiffs. It is further ordered that the cause stand continued for the term.

28 In the circuit court of the United States, in and for the district of Nevada.

LOUIS FEUSIER ET AL., EXECUTORS, ETC.,
vs.
GEORGE I. LAMMON ET AL.

This cause came on regularly to be tried before the court without a jury, the parties having, by stipulation in writing, waived a jury, and thereupon the respective parties introduced their testimony, and the cause was argued by counsel, and now after due consideration thereof the court finds that the testator of the plaintiffs, Henry Feusier, was the owner of the goods and chattels levied on by the defendant, George I. Lammon, in the suit of M. Manseau against E. D. Feusier, and all the issues of fact in favor of the plaintiffs and assess the damages at three thousand
29 sixty-five and $\frac{15}{100}$ dollars, with interest thereon, at the rate of ten per cent. per annum, from the eighth day of December, A. D. 1871, to the present time.

As conclusions of law, the court finds that the plaintiffs are entitled to judgment for the sum and interest aforesaid, with costs of suit amounting in all to the sum of dollars.

April 9, 1880.

HILLYER,
District Judge.

(Endorsed:) Louis Feusier et als., executors, etc., v. Geo. I. Lammon et als. Findings. Filed April 9, 1880. T. J. Edwards, clerk.

30 In the circuit court of the United States, ninth circuit and district of Nevada, March term, 1880.

LOUIS FEUSIER AND ADOLPH BRUGIER, executors of the last will of Henry Feusier, dec'd, plaintiffs,
vs.
GEORGE I. LAMMON, WILLIAM SHARON, J. W. Mackay, and F. A. Tritle, defendants.

This cause came on regularly for trial at the March term, 1879, before the court sitting without a jury, a jury having been expressly waived.

The parties appeared by their attorneys, introduced their proofs, and submitted the cause.

And the court having duly considered the premises, now renders and files its findings in favor of plaintiffs, and orders judgment to be entered as prayed in the complaint.

It is therefore ordered and adjudged that said plaintiffs do have
31 and recover of and from the defendants, George I. Lammon, William Sharon, J. W. Mackay, and F. A. Tritle the sum of three thousand sixty-five & $\frac{15}{100}$ dollars, with interest thereon from the eighth day of December, 1871, to this date, at the rate of ten per cent. per annum, amounting to twenty-five hundred fifty-five & $\frac{14}{100}$ dollars, making in the aggregate the sum of five thousand six hundred twenty & $\frac{29}{100}$ ($5,620.29) dollars, together with interest on the sum of three thousand sixty-five & $\frac{15}{100}$ dollars from this date until paid, at ten per cent. per annum, and costs of suit taxed at $67.60.

Dated and entered April 9, 1880.

Attest:

T. J. EDWARDS, *Clerk.*

32 UNITED STATES OF AMERICA,
District of Nevada, ss:

I, T. J. Edwards, clerk of the circuit court of the United States for the district of Nevada, do hereby certify that the above and foregoing is a full, true, and correct copy of the original judgment now on file and of record in my office, and that the foregoing and annexed papers constitute the judgment roll in said action.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court, at my office in Carson City, this the 9th day of April, A. D. 1880, and in the year of our Independence the 104th.

[L. S.] T. J. EDWARDS, *Clerk.*

(Endorsed:) U. S. circuit court, dist. Nevada. Louis Feusier et al. executors, &c., v. Geo. I. Lammon et als. Judgment roll. Filed April 9, 1880. T. J. Edwards, clerk.

33 In the circuit court of the United States of the ninth judicial circuit in and for the district of Nevada.

LOUIS FEUSIER ET AL., EXECUTORS, &C.,)
v.
GEORGE I. LAMMON ET ALS.)

If the question in this case were new I should have no difficulty in agreeing with my associate. It seems to me, upon principal, and in view of the rule that the liabilities of sureties cannot be extended by construction, the sureties should not be held liable for a trespass committed by the marshal. There were no official relations between him and the party upon whom he committed the trespass. It is no more his duty as an officer than as a private citizen to abstain from committing a trespass. The duty is
34 private, not official, and the bond is intendede to secure the performance of official, not private, duties. But the authorities are in conflict on the point, being in number about equally divided, the later ones, perhaps, following the New York case, predominating in favor of the liability. Upon the whole, I shall follow those later cases, notwithstanding

my own views to the contrary, as to the propriety of the rule adopted. I find no decision upon the point in the national courts. The question, I think, ought to be authoritatively settled by the Supreme Court. As the amount involved is not sufficient to enable the parties to have a review or writ of error in the regular course we will certify a division of opinion upon the point, so as to enable the parties to obtain the judgment of the Supreme Court. We are satisfied that neither of the other defenses
35 set up is good. Let judgment be entered for the plaintiff in the sum of three thousand sixty-five and $\frac{15}{100}$ dollars, and interest from December 8, 1871, at the rate of ten per cent. per annum, amounting in all to five thousand six hundred twenty & $\frac{29}{100}$ dollars.

SAWYER, *Circuit Judge.*

36 In the circuit court of the United States for the district of Nevada.

LOUIS FEUSIER ET AL., EXECUTORS, ETC.
vs.
GEORGE I. LAMMON ET ALS.

The question upon which this case turns is, whether the sureties on the marshal's bond are liable for a levy of an attachment by that officer on the property of Henry Feusier, the plaintiff's testator, by virtue of a writ directing him to attach the property of E. D. Feusier.

The condition of the bond is "that the said George I. Lammon, by himself and by his deputies, shall faithfully perform all the duties of the said office of marshal."

Owing to conflicting decisions by the State courts, this question cannot be considered as at all settled by authority, and although in some
37 of its aspects it is undoubtedly a close one. That line of argument which conducts to a conclusion against the liability of the sureties is to my mind entirely convincing. In the first place, the sureties invoke that rule which must always be applied in construing their contracts, and which is thus stated in the United States vs. Cheeseman, 3 Sawyer, 424–429. "The liabilities of sureties cannot be extended by implication or construction. The surety cannot be bound beyond the scope of his engagement. He is entitled to stand upon the strict terms of his contract. His liability is strictissimi juris, and cannot be extended beyond the reasonably necessary import of the language of his bond." This is fully sustained by a citation of the authorities, as follows: Miller vs. Stuart, 9 Wheat., 703; United States vs. Boyd, 15 Pet., 207–9;
38 Legget vs. Humphreys, 21 How., 76; Morton vs. Thomas, 24 How., 317; Smith vs. United States, 2 Wal., 235.

Before the plaintiffs can recover against these sureties they must show that the condition of their bond, strictly construed in their favor, has been broken. No considerations of public policy, convenience, or security can be permitted to extend their liability. These may be good grounds for legislative action, enlarging the conditions of the bond, but courts cannot look beyond the strict letter of their contract. An official bond is required of an officer as a security for those whose personal or property rights may, by virtue of his office, be placed in his official keeping. To bind the sureties it must appear that their principal has failed
39 faithfully to perform some official duty. If, then, it can be shown

that the act now complained of was a naked trespass, the commission of which might have been lawfully resisted with force, and that the marshal had no official relations with the testator of the plaintiffs, it would seem to follow that there has been no breach of the condition of the bond.

That the act was a trespass, and the marshal a mere trespasser, is not and cannot be denied. He stands precisely in the position of every other trespasser. Boulware vs. Craddock, 30 Cal., 190. He was liable without reference to his official character to the injured party for his own tort in an action of trespass. Buck vs. Colbath, 3 Wal., 334. So it is equally clear that this trespass gained nothing in legality because the
40 wrong doer pretended to act as marshal. Resistance by the owner and possessor of the property would have been lawful. In such case a charge against him of resisting an officer would have been well answered by proof that the marshal had no power or authority under the writ to take the property. State vs. Cannover, 28 N. J., 224. Elder vs. Morrison, 10 Wend., 128. Com. vs. Kennard, 8 Pick., 133. Waterman on Trespass, sec. 25.

Public policy forbids resistance to the marshal when acting as an officer within the scope of his official authority, but it is resistance to the officer, not the man. His official character shields him no longer than while his acts continue to be official. It is as lawful to resist a trespasser with process as one without process.

41 No one may lawfully resist an officer so long as he is acting officially, and when it is shown that resistance would have been lawful, it seems an inevitable conclusion that the officer was not acting officially.

Again, although put in motion by legal process, no official relation was established thereby between the marshal and Henry Feusier, and his bondsmen have only bound themselves to those persons who have such relation with their principal. Here the relation between the marshal with a writ and the injured party is precisely the same as that between George I. Lammon without a writ and Henry Feusier. In both cases, as the authorities all show, the relation is that of a naked trespasser to the injured party. In both cases relief may be had upon precisely the same averments and proofs.

42 With whom was the marshal brought into official relations in the suit of Manseau vs. E. D. Feusier, in which the writ in question was issue? It must be answered that his official obligations were to the parties in that suit. He was bound when the writ was placed in his hands, by his official duty to the plaintiff, to execute it with due diligence, and to the defendant to execute it without undue severity or oppression. For any failure to discharge these duties his sureties are answerable to the party injured. Henry Feusier and other strangers to the suit and process were in no manner concerned with him as an officer. He had no official duty to do which had the remotest relation to Henry Feusier or his property. How, then, can the marshals act in respect to Henry Feusier,
43 to whom he owed no official duty, fix a liability upon his sureties who have only bound themselves to those who have official relations with him?

The following cases are cited in support of these views:

State vs. Connover, 28 N. J. S. R., 224.

Garber vs. Ackerly, 37 Wis., 431.
State vs. Long, 8 Iredell, 415.
State vs. Brow, 11 do., 141.
Jenkins vs. Lemmons, 29 Ind., 294.
Clarey vs. State, 34 " 105.
Brown " Maseby, 11 S. & M., 354.
Alcock vs. Andrews, 2 Esp., 541.

And the opinion of the majority of the court delivered by Pratt, J., in People vs. Schuyler, infra.

The leading case cited by the plaintiffs is Cormack vs. Com., 5 Bruin, Penn., 186, decided in 1812. The fact that this decision is made to rest upon the ground "that public policy and public security require a
44 liberal and extended construction of the recognizance" must materially lessen if not destroy its weight as authority. The rule of construction laid down is directly opposed to that stated above and now everywhere regarded as the true one.

The next thoroughly considered case is that of People vs. Schuyler, 4 Com., 173. There the court of appeals of New York, by a divided court—five judges to three—sustained the liability of the sureties. While this case settles the law for New York it is not unworthy of observation, as tending to diminish its authority outside of the State, that the point had been twice before decided otherwise by the supreme court of that State in ex parte Reed, 4 Hill, 572, by justices Nelson, Bronson, and Couren,
45 and later, in the principal case 5 Bart., 166, by justices Wright, Watson, and Parker. Thus of the fourteen judges who have there passed directly upon this question, nine, among whom Nelson and Couren are names of great authority, have denied, and but five have affirmed the liability.

The cases cited by plaintiff from Texas, Iowa, and Ohio follow this court of appeals decision, and are affected by the observation made thereon.

In my opinion the defendants should have judgment.

HILLYER, *District Judge.*

(Endorsed:) U. S. circuit court, dist. Nevada. Louis Feusier et al., executors, et al., vs. Geo. I. Lammon et als. Opinion. Filed April 9, 1880. T. J. Edwards, clerk.

46 UNITED STATES OF AMERICA,
Nevada District:

At a circuit court of the United States begun and held at Carson City, for the district of Nevada, on the fifteenth day of March, A. D. 1880.

Present the honorable Lorenzo Sawyer, circuit judge, and E. W. Hillyer, district judge.

LOUIS FEUSIER AND ADOLPH BRUGIER, EXECUTORS of the estate and last will of Henry Feusier, plaintiffs,
vs.
GEORGE I. LAMMON, WILLIAM SHARON, J. W. Macky, and F. A. Tritle, defendants.

State of the pleadings.

This is an action upon a bond given by the defendant George I. Lammon,

as United States marshal for the district of Nevada, and by
47 the other defendants as his sureties, dated June 2d, 1869.

The condition of said bond is as follows:

Whereas the President of the United States hath, pursuant to law, appointed the said George I. Lammon to be marshal of the United States for the district of Nevada, to have and to hold the same, with all the rights, privileges, and emoluments thereto lawfully appertaining, for four years from the sixteenth day of April, 1869, unless sooner removed therefrom, as by a commission to him bearing date the sixteenth day of April, 1869, more fully appears:

Now, if the said George I. Lammon, by himself and by his deputies, shall faithfully perform all the duties of the said office of marshal, then this obligation shall be void; otherwise to remain in full force and virtue.

48 At the trial it appeared from the evidence that the said George I. Lammon, while marshal and while the said bond was in force, having in his hands a writ of attachment against the property of one E. D. Feusier, levied the same upon the property of one Henry Fensier, the plaintiffs' intestate and a stranger to the writ, and it occurred as a question whether the taking of the property of said Henry Feusier, upon a writ of attachment against E. D. Feusier, constituted a breach of official duty on the part of said George I. Lammon, for which his sureties, the other defendants, are liable.

On which question the opinions of the judges were opposed.

Whereupon, on motion of the defendants, by their counsel, that the point on which the disagreement hath happened may, during the term,
49 be stated under the direction of the judges and certified under the seal of the court to the Supreme Court to be finally decided, it is ordered that the foregoing state of the pleadings and facts, which is made under the direction of the judges, be certified, according to the request of the defendants, by their counsel, and the law in that case made and provided.

LORENZO SAWYER,
Circuit Judge.
E. W. HILLYER,
District Judge.

(Endorsed:) U. S. circuit court, dist. Nevada. Louis Feusier et als., executors, etc., vs. George I. Lammon et als. Certificate of division of opinion. Filed Aug. 28, 1880. T. J. Edwards, clerk.

50 In the Supreme Court of the United States of America.

LOUIS FEUSIER ET AL., EXECUTORS, &C., PLAINTIFFS,
v.
GEORGE I. LAMMON ET ALS., DEFENDANTS.

Know all men by these presents that we, Chancellor Derby and William H. Smith, of the city of Virginia, county of Storey, and State of Nevada, are held and firmly bound unto Louis Feusier and Adolph Brugier, executors of the last will and testament of Henry Feusier, deceased, plaintiffs

in said action, in the sum of ten thousand dollars, lawful money of the United States, to be paid to the said plaintiffs, or their successors in interest; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals and dated this day of , A. D. 1880.

51 Whereas the above-named defendants hath prosecuted a writ of error to the Supreme Court of United States to reverse the judgment rendered in said action by the circuit court of the United States, 9th circuit and district of Nevada:

Now, therefore, the condition of this obligation is such that if the above-named defendants shall prosecute their said writ of error to effect, and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

CHANCELLOR DERBY. [SEAL.]
WILLIAM H. SMITH. [SEAL.]

UNITED STATES OF AMERICA,
District of Nevada, ss:

Chancellor Derby and William H. Smith, being duly sworn, each for himself, deposes and says that he is a resident of said district and a householder therein, and that he is worth the sum of ten thousand dollars over and above all his just debts and liabilities, exclusive of property

52 exempt from execution.

CHANCELLOR DERBY.
WILLIAM H. SMITH.

Subscribed and sworn to before me this 31st day of August, 1880.
[L. S.] A. H. RICKETTS,
Notary Public, Storey Co., Nev.

(Endorsed:) In Supreme Court of United States. Louis Feusier et al. vs. Geo. I. Lammon et als. Bond. Filed Sept. 1, 1880. T. J. Edwards, clerk cir. court, dist. Nevada.

Approved—

E. W. HILLYER, *Judge.*

53 UNITED STATES OF AMERICA, *ss:*

To Louis Feusier and Adolph Brugier, executors of the last will and testament of Henry Feusier, deceased, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States, ninth judicial circuit, for the district of Nevada, wherein George I. Lammon, William Sharon, J. W. Mackay, and F. A. Tritle are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this first day of September, 1880.

E. W. HILLYER,
54 *District Judge.*

(Endorsed:) In Supreme Court of the United States. Geo. I. Lammon et als., pl'ffs in error, v. Louis Feusier et al. Citation. Filed Sept. 3, 1880. T. J. Edwards, clerk U. S. cir. court, dist. Nevada.

Service of the within citation & reception of a copy of the same is acknowledged this 2d day of Sept., 1880.

WILLIAMS & BIXLER, &
M. N. STONE,
Att'ys for Pl'ffs, Def'ts in Error.

In the circuit court of the United States, ninth circuit and district of Nevada.

LOUIS FEUSIER ET AL. }
v.
GEO. I. LAMMON ET ALS. }

I, T. J. Edwards, clerk of said circuit court, do hereby certify that the foregoing fifty-four written pages, numbered from 1 to 54 inclusive, are a true copy of the record and of all the proceedings in the cause therein entitled, and that the same, together, constitute the return to the annexed writ of error.

Witness my hand and the seal of said circuit court this 13th day of September, A. D. 1880.

[SEAL.] T. J. EDWARDS, *Clerk.*

55 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the ninth circuit and district of Nevada, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Louis Feusier and Adolph Brugier, executors of the last will and testament of Henry Feusier, deceased, plaintiffs, and George I. Lammon, William Sharon, J. W. Mackay, and F. A. Tritle, defendants, a manifest error hath happened, to the great damage of the said defendants, as by their complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your
56 seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done

therein to correct that error what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, this the first day of September, A. D. 1880.

T. J. EDWARDS,
Clerk Circuit Court, 9th Circuit, Dist. Nevada.

Allowed by—

E. W. HILLYER, *Judge.*

57 (Indorsed:) In Supreme Court of the United States. Geo. I. Lammon, et al., pl'ffs in error, v. Louis Feusier et al., executors, &c., def'ts in error. Writ of error. Filed Sept. 1, 1880, and a copy lodged in my office for the def'ts in error. T. J. Edwards, clerk cir. court, dist. Nevada.

(Indorsement on cover:) No. 448. George I. Lammon, William Sharon, J. W. MacKay, and F. A. Tritle, plaintiffs in error, vs. Louis Feusier & Adolph Brugier, executors of Henry Feusier, deceased. Nevada C. C. U. S. Filed 4th November, 1880.

IN THE

Supreme Court of the United States.

GEORGE I. LAMMON ET AL.,
Plaintiffs in Error.

vs.

LOUIS FUSIER ET AL.,
EXECUTORS, &C.,
Defendants in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

C. J. HILLYER,
For Plaintiffs in Error.

IN THE

Supreme Court of the United States.

GEORGE I. LAMMON ET AL.,
Plaintiffs in Error.

vs.

LOUIS FUSIER ET AL.,
EXECUTORS, &C.,
Defendants in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT.

This is an action commenced in the United States circuit court for the district of Nevada, on the official bond of defendant Lammon as U. S. marshal of said district, executed by said Lammon as principal, and by the other defendants as sureties.

The condition of the bond is that "the said George I. "Lammon, by himself and by his deputies, shall faithfully "perform all the duties of the said office of marshal."

The alleged breach of this condition is, that the said marshal, having in his hands a writ of attachment against the property of one E. D. Fusier, and intending to act under and

by virtue of said writ, wrongfully and unlawfully seized and detained the property of the plantiff's testator, Henry Fusier, Sr. In the circuit court the judges were divided in opinion as to the liability of the sureties upon the bond, and, thereupon judgment was pronounced in accordance with the opinion of the circuit judge in favor of the plaintiffs. The case is brought to this court by writ of error, and upon a certificate of this difference of opinion. The only error relied upon is in the decision of the lower court as to the liability upon the admitted facts of the sureties.

ARGUMENT.

The question presented is whether the alleged illegal acts constitute a breach of the condition of the bond. I maintain that they do not, for the reason that they were not official acts. The liability which they created against defendant Lammon was not against him as an officer, but as an individual. This seems to us to follow conclusively from the consideration that in an action to establish and enforce this liability, it is unnecessary to either plead or prove the official character of the defendant. The course of action would be in no manner strengthened or modified by such averment or proof. Neither would his official character be of any avail as a defence. Such an averment in the pleading, on either side, would be mere surplusage. How, then, can that be deemed an official act, which neither requires nor permits, for its justification or redress, a consideration of the official character of the agent? But however conclusive this line of reasoning may seem to me, I am aware that several of the highest judicial tribunals of the country have not been impressed by it in the same manner, and have arrived, by different reasoning, at an opposite conclusion.

So far as I have observed, there are no decisions by the federal courts bearing directly upon the proposition.

The decisions in the State courts are quite numerous, and in many cases directly conflicting.

In the following States decisions, either upon the precise point or incapable of being distinguished from such, in principle, have been made affirming the liability of the sureties upon the bond:

In New York, *People* v. *Schuyler* (4 Comstock, 173), by a divided court, five judges to three.

In Pennsylvania, *Carmack* v. *Commonwealth* (5 Binney, 184), followed in *Bennett* v. *McKee* (6 Watts & Ser. 515).

In Ohio, *Ohio* v. *Jennings* (4 Ohio State Rep. 419).

In Iowa, *Charles* v. *Hawkins* (11 Iowa, 329).

In Missouri, *State* v. *Shacklett* (37 Mo. 280).

In Kentucky, *Commonwealth* v. *Stockton* (5 Monroe, 192).

In Maine, *Harris* v. *Hanson* (11 Maine, 241).

In California, *Van Pelt* v. *Littler* (14 Cal. 194.)

In the following States, decisions, either directly in point or distinctly affirming the controlling principle, have been made denying the liability.

In New York, *ex parte Reed* (4 Hill, 573), decided by Judge Cowen, and in all cases previous to that of *People* v. *Schuyler*, and by the Supreme Court in that case.

In New Jersey, *State* v. *Conover* (28 N. J. L. R. 224).

In Wisconsin, *Garber* v. *Ackley* (32 Wis. 234, and same case, 37 Wis. 431).

In North Carolina, *State* v. *Long* (8 Iredell, 415), and *State* v. *Brown* (11 Iredell, 141).

In Alabama, *Governor* v. *Hancock* (2 Alabama, 728).

In Indiana, *Jenkins Adm.* v. *Lemonds* (29 Ind. 294), and *Clarey* v. *State* (34 Ind. 105).

In Mississippi, *Brown* v. *Moseley* (11 Smede & M. 354).

An examination of the above cases show that the doctrine in respect to the point here in question cannot, in any manner, be considered as settled by authority.

While a larger number of decisions have affirmed the liability of the bondsmen, yet those holding the contrary are so numerous, and pronounced by tribunals of such respectability as to hold the scales fairly in suspense.

The question must be decided in the present case by a comparison of reasoning, and by the logical application of general legal principles.

For the purpose of ascertaining the respective grounds on which the opposing decisions have been based, it will scarcely be necessary to examine more than three cases; the California case, the case in Court of Appeals in New York, and the New Jersey case. These are the cases in which the subject has been most elaborately and critically discussed. Whatever reasons have been judicially advanced in favor of the liability of the bondsmen, will be found in the opinion of the Supreme Court of California, and the majority opinion in the Court of Appeals of New York; and those in support of the opposite conclusion are exhaustively stated in the minority opinion in the latter case, and in that of the Supreme Court of New Jersey.

A review of these opinions will show that they all agree upon the proposition that the liability of the sureties is not to be extended by implication. They are entitled to stand upon the exact terms of their contract strictly construed. It is also agreed, that to charge the sureties, the acts complained of must be official, as distinguished from individual, acts. The disagreement arises in drawing the line between these two classes of acts. On the one hand, it is maintained that if an officer wrongfully seizes the goods of A, against which he has no process, yet if he pretends and asserts that the seizure is made by virtue of a process, which he has against the goods of B, then his act is official. On the other hand, it is held that the character of the wrongful act of seizing the property of A, without process against him, is not in any manner affected by the fact that he has in his hands process against the property of B.

Perhaps there is no better way of presenting my views than to examine *seriatim* the positions and arguments in the majority opinion of the New York court delivered by Judge Gardiner.

After a preliminary statement of one or two undisputed propositions, the opinion first enters upon debatable ground in the following language: "If he (the officer) had in all things performed his duty he would have seized the goods of Fay or returned the writ, instead of which he levied upon the goods of Batcheldor as the property of the defendant in the attachment. Upon principle and upon grounds of public policy it seems to me that the responsibility of his sureties should be different from those they would incur if the sheriff had entered upon the premises of the relator and removed his goods without any process whatever. In the last case supposed the sheriff would act in his own right and *might be resisted as any other wrongdoer*. In the one before us he was *put in motion* by legal authority invoked in behalf of others, and could command the power of the county to aid him in its execution."

It is not too much to say that the proposition here asserted, in respect to the right of resistance, is the vital point of controversy. The learned judge did not fail to perceive how important, nay, necessary, to his position, was the maintainance of the distinction which he suggests. It could not be contended that the mere fact, that the person seizing property without authority, was an officer and therefore, under certain circumstances authorized to make a seizure, was sufficient to make of the illegal seizure an official act. It is conceded that such a seizure without process, would be a naked, individual trespass; that the officer might be lawfully resisted; that he would have no legal right to call for assistance, and that no one would be justified in aiding him. It is therefore not the official character with which he is clothed, but the *process which he has in his hands* that determines whether he is acting as an individual, or in the discharge of his official duty. But if this be so, must not the process be in some manner relevant to the act? Under a writ of attachment may he arrest the defendant or under a warrant seize property? Is there any conceivable relation between a process against the

property of A and the act of seizing the goods of B? But it is hardly necessary to criticise the logic of this attempted distinction. Under the test which the learned judge proposes, the question is fully settled by authority. His reasoning admits that if the process against Fay did not so protect the officer, in taking the property of a stranger, that the latter could not lawfully resist him, and that the officer had a right to command the aid of the county in taking it, then the seizure was not an official act. The Supreme Court of California also recognizes the propriety of this test, and finds it necessary to assume, that "no resistance can lawfully be made by any person whose property is thus taken," (14 Cal. p. 200). I am confident that such is not the law, but that the rule is definitely settled to the contrary.

Elder v. *Morrison*, 10 Wendell 128.
Commonwealth v. *Kennard*, 8 Pick. 133.
Alcock v. *Andrews*, 2 Esp. 540.

No authority in support of the assumed proposition is cited, either by the court of New York or that of California, and I feel sure that none can be found.

In the New York opinion, the proposition is supported by the following remark: "Respect for the process of our "courts and for the official character of the sheriff, if it did "not forbid forcible opposition (which must be unavailing), "is incompatible with the notion of making resistance indis- "pensable as a means of protection. This must be the alter- "native, or those who are thus aggrieved are driven to rely "exclusively upon the responsibility of the officer, who, as "in this case, may be wholly insolvent." I submit that this language does not indicate any strong confidence by the learned judge in the position which he assumes, and that its reasoning is singularly unsatisfactory. Respect for the "process" can only forbid opposition to some act within the scope of its authorization. Respect for the "official character" of the sheriff would forbid opposition equally, whether he had

or had not any process in his hands. There is no more exposure to loss, by the trespass of an insolvent sheriff, than by that of an insolvent private individual; and on this score no reason exists for permitting or denying the right of resistance to the one more than to the other.

I have devoted this much attention to this proposition because it seems to me to be fundamental in the controversy. The law protects the sheriff in the execution of process. It forbids resistance. It authorizes the officer to call upon private individuals to aid in its execution, and requires the latter to obey the call. Now, if the act here complained of was one in respect to which none of these rights or obligations existed, then it was not an act done in the execution of process or in the discharge of official duty, and therefore not within the terms of the undertaking of the bondsmen.

Proceeding with the opinion, we pass by the criticism upon the decision by Judge Cowen in *ex parte* Reed, with the remark that this decision was evidently made upon careful consideration, in view of opposing decisions in other States, and is entitled to the weight due to the eminent character of the judge by whom it was pronounced.

The attempt to show that in the subsequent case of *ex parte* Chester, the same court had, without being aware of it, assumed a doctrine in conflict with that of *ex parte* Reed, seems to me to have failed. The latter was an action for a false return. The making of a return to process in his hands was a part of the official duty enjoined upon the sheriff. It was a duty which he owed to the plaintiff, between whom and himself official relations were created by the delivery of the process. The failure to make a return, or the making of an imperfect or false return, was evidently a breach of this official duty. Apply the test suggested in the commencement of this argument. Could the liability of the sheriff be established without averment and proof of his official character? If not, and this will be conceded, then it is because that the wrongful act was such that he was liable in his official capa-

city, while the same test applied to the facts in *ex parte* Reed would determine the act there in question to have been unofficial.

It is next suggested in the opinion, that certain decisions in England and America under statutes for the protection of officers, furnish an argument, by analogy, in support of the liability of the sureties. The English cases cited are all under a statute requiring notice to be given before commencing action against a magistrate. They all turn upon the construction of the statute, holding, for very obvious reasons, that it must apply to acts in excess of jurisdiction; for otherwise, as a magistrate could not be liable for an exercise of jurisdiction, however erroneous, the statute could have no force whatever. The case of *Sedley* v. *Birdsall* (15 Johns, 267) was an action for a false return, the citation of which, in support of the doctrine contended for, seems very unfortunate, for the reason that the decision is based by the Supreme Court upon the express ground that the act complained of was "*virtute officii*" and not "*colore officii*," thereby indorsing directly the doctrine of *ex parte* Reed, and the distinction there taken. The only other case cited, that from 1st Mass., is in no way relevant to this branch of the argument, but will be considered hereafter in connection with another.

Following the course of the opinion, I next come to the argument, derived from decisions holding the sheriff responsible for the tortious acts of his deputy. This argument I admit is plausible, but it is deprived of all its force when the proper distinction is made between the relation which a deputy sustains to the sheriff and that which the sheriff sustains to his bondsmen. To make the decisions of any value in the present argument, it should appear that they were predicated upon the proposition that the sheriff was liable for the trespass of the deputy, because that such trespass was an official act and done in the discharge—erroneous and unfaithful discharge, no doubt—of the duties of his office. But such a predicate of this liability is nowhere as-

sumed or asserted. It is said that the deputy stands to the sheriff in the relation of a servant to a master, and the liability of the latter is based entirely upon this relationship. The authority conferred by the sheriff, as master upon his deputy, is held to extend, not only to acts in the discharge of official duty, but to all acts, however illegal, which are done by the latter under color of his official position. If there be no previous direct command or subsequent recognition, the law presumes the authority from the peculiar and confidential relations of the parties. The leading case upon the subject is *Grinnell* v. *Phillips* (1 Mass. 530). Sewall, Justice, there says: "It seems to be well established by an-"cient and modern decisions, that the master is liable for "every act done by the servant *in the course of his employment;* "the law implying, from their relation and from the circum-"stances of the act, that it is done by the procurement and "command of the master. The law views the relation of a "sheriff and his deputies in the same light. In official acts "they are not distinguishable from each other." And again, in commenting upon some English cases, cited in opposition to the sheriff's liability, he says: "With us the deputy acts "by a *general* command. The authority vested in him is an "implied command of the sheriff in *every* act; whereas in "England there might be some color for an argument that "the special command of the sheriff authorizing the per-"formance of a lawful act in a lawful manner, is no author-"ity to the deputy in any illegal proceeding." The decision is rested by the other judges upon the same ground, to wit: an implied authority extending to illegal as well as legal acts.

In the opinion, the case of *Bond* v. *Ward* (7 Mass. 127), is specially cited as sustaining a contrary view. But an examination of that case shows that it affords no countenance for such an assertion. The act there in question was the failure of the deputy to attach certain hides, and the only doubt was whether the process required that they should be attached. There was nothing in the case calling for or suggesting a con-

sideration of the *grounds* of the liability of the sheriff for a trespass of his deputy, nor is there any language in the opinion addressed even incidentally to this inquiry. We have also examined the other decisions referred to upon this point, and in none of them is any different basis of the liability declared. Now, no one will pretend that there is any such relation as principal and agent, or master and servant, between the sheriff and his bondsmen. They are simply sureties, and have no relations with their principal except such as are expressly created by the terms of their contract. The cardinal and admitted principle governing the construction of their contract forbids invoking against them that implication or assumption of authorization upon which alone the liability for acts of the deputy is declared to repose.

The opinion next proceeds to consider cases directly upon the point. The first cited, and that which seems most to have been relied upon, is the decision of the Supreme Court of Massachusetts, in *Skinner* v. *Phillips* (4 Mass. p. 69). It is somewhat singular that upon examination, it appears, that in this case the point in question was neither discussed nor decided. It could not, in fact, have been decided. The action was upon a bond, given to the treasurer of the Commonwealth, conditioned to answer for the "malfeasance and misfeasance" of the officer, and the declaration averred that a judgment had been recovered against the sheriff for "misfeasance and malfeasance," using the very terms of the condition and not showing in any manner the nature of the wrongful acts. The question arose on demurrer, and the only point discussed or decided was whether the sureties were answerable for any injury, except one suffered by the Commonwealth. It seems to me to weaken the force of the New York opinion, and also that of several decisions in other States, that this case of *Skinner* v. *Phillips* is relied upon as an expression by the Supreme Court of Massachusetts upon the point under consideration.

The decisions cited from other States, Maine, Pennsylvania and Kentucky, are undoubtedly in point, but they are supported by no other reasons or authorities than those relied upon in the opinion which I have been considering. The central idea which seems to control them all, and which is expressed in most of them, may be stated syllogistically as follows: The bond is given for the faithful discharge of his duties, by the officer. It is not a faithful discharge of his duty, having a writ against the property of A, to seize the goods of B. Therefore the condition of the bond is broken. This may be true as stated. But it is overlooked that the vital question is, *in respect to whom it is broken.* Certainly not in respect to B, for to him, neither by virtue of his office, nor his process, nor otherwise, did he owe any duty other than that which is due from one citizen to another. Owing to him no duty, he could incur toward him no obligation; either by failure to perform or by an unfaithful performance. With the parties to the action, the process established official relations, and created rights and obligations, and for any default or error, in exercising the rights or discharging the obligations, to the injury of either, the officer must answer in his official capacity. The vice of the reasoning consists in a failure to recognize, that the same act may be an unfaithful discharge of official duty, toward the plaintiff in the action, and yet only an individual trespass as to a stranger. The distinction is pointed out with admirable clearness and force in the minority opinion in the New York case, where it is said, "the question is not in what character the sheriff *intended to act*, but in what character *is he made liable*." This remark sounds the key note of the controversy. Those whose minds are so constituted, that its statement does not compel assent to its truth, and reveal clearly its logical sequence, will or may affirm the liability of the bondsmen. Those whom it impresses as it does me, will come without hesitation or difficulty to the opposite conclusion. It is in fact but a terse expression of the leading thought with which I commenced this argument. The character in which an officer is made

liable may, in every instance, be determined by considering whether, in an action against him to enforce this liability, it is necessary to aver and prove his official character. For illustration let us take the case of *Clarey* v. *The State*, above cited, decided by the Supreme Court of Indiana. One of the parties to an action, in open court, paid in money with a view to make a tender, and handed the same to the clerk, who receipted for it as clerk, supposing that it came to him in this capacity. No order of the court was in fact made in respect to it. The clerk failing to repay the money, it was held that his bondsmen were not responsible, for the reason that although in taking the money he intended to act, and believed he was properly acting as clerk, yet owing to his want of authority, he could only be made liable in his individual capacity. Had there been an order of court authorizing him to receive the money, then he would have been liable in his official capacity, and, therefore, the condition of his bond would have been broken. In this latter case, in an action to recover the money, the official character of the clerk must have been averred and proven, while upon the actual facts, such averment and proof were entirely unnecessary. By keeping steadily in view this test of the character in which the wrongdoer is to be made liable, as determined by the necessity of establishing his official character, in an action to enforce the liability, we have, as it seems to me, a simple and safe criterion by which to decide as to the responsibility of the bondsmen.

In conclusion, I should be said that it is with great diffidence that I have attempted to add anything, by way of argument, to the masterly discussion of this subject by the majority of the Court of Appeals of New York and by the Supreme Court of New Jersey, and I ask the court to look to those opinions, rather than to what I have said, as embodying the substance of the argument in favor of our position.

C. J. HILLYER,

For Plaintiffs in Error.

OFFICE SUPREME COURT U. S.
FILED
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JAMES H. MCKENNEY, CLERK

111-17

In the Supreme Court

OF THE

UNITED STATES.

GEORGE I. LAMMON ET AL.

Plaintiffs in Error,

VS.

LOUIS FEUSIER ET AL.

EXECUTORS,

Defendants in Error.

BRIEF OF M. N. STONE

FOR DEFENDANTS IN ERROR.

Torras & Freeman, Printers, San Francisco, Cal.

Supreme Court of the United States

GEORGE I. LAMMON ET AL.,
Plaintiffs in Error,

vs.

LOUIS FEUSIER ET AL., EXECUTORS,
Defendants in Error.

Brief of M. N. Stone for Defendants in Error.

I.

The question to be determined by the Court in this case is, whether the sureties on the Marshal's bond are liable for a levy of an attachment made by that officer on the property of Henry Feusier, in an action brought against one E. D. Feusier.

The bond is conditioned for the "faithful performance of the duties of the office of United States Marshal." It is claimed that the taking of the property by the officer under such process was not a breach of this condition, he having no authority by virtue of his office or the process of attachment, to levy upon and take the property of a stranger to the suit; that the levy was a tres-

pass under "color of office," which Henry Feusier could lawfully resist, and that only such acts as are performed by the officer *virtute officii* are within the condition of the bond.

The discussion, therefore, on this question is confined to the single inquiry—whether an act performed by an officer with process in his hands, under "color of office," is an official act, or the act of an individual merely?

It is said by counsel representing the Marshal and his sureties in this action, that the adjudged cases on this subject are in such conflict that it is necessary that their reasoning should be compared, and that a "logical application of general legal principles" should dispose of the question adversely to plaintiff.

Whilst it is not admitted that the authorities which deny such liability are "numerous or pronounced," it is conceded that the reasons offered to maintain it should be sound and convincing. It is conceded further, for the purposes of this discussion, that the conditions in an officer's bond should not be extended by implication so as to create a liability for the performance of acts not fairly contemplated by those conditions.

Applying this test, was not the wrongful levy a breach of the condition named? By the condition contained in the instrument, the officer is required to do more than faithfully perform the duties of his office between the parties to each action in which he receives process for enforcement. The covenant

is made with the *public*, as well as litigants, that he will faithfully perform such duties; and the language is sufficiently comprehensive to embrace every act performed by the officer with process in his hands, and with which he assumes to act officially. The purpose of such obligations being to protect and indemnify the public, as well as the immediate parties to suits, that purpose is entirely defeated if those alone are official acts which are performed between the parties to the action.

It is, by the words of the bond, as much the duty of the officer not to take with his process the goods of a stranger to the suit unless indemnity is given him, as it is his duty with such process to levy upon the property of the party against whom it is issued.

The "duties of his office" require him to refrain from the performance of unlawful acts when assuming with process to act officially, and the performance of those duties, it cannot with good reason be said, should be confined alone to the parties to the actions in which process has been issued to him.

A "faithful" performance of official duties embraces more than a mere honest performance of them. The word "faithful" in an officer's bond is synonymous with "legal" or "lawful," and the liability of the surety is created whenever process, which could not be issued to him except by virtue of his office, is unlawfully or wrongfully levied upon property by him.

Indeed, it is impossible to see how the liability

of the surety is extended beyond the plain words of the bond, when the officer enforces his process against the goods of a stranger to the litigation. No person other than the Marshal or his deputy has authority to receive the process of attachment for execution. When issued it at once becomes his badge of office. His official character does not become lost in the individual by the levy of the writ on the stranger's goods. Such an act, it is manifest, cannot be treated as simply the private or individual act of the officer. The existence of the process in his hands, officially received by him, removes it from the class of individual acts for the performance of which he would be liable alone to the person injured. That such an act is official, and not individual, is shown by the fact that the plaintiff in the litigation who causes the writ to issue to the officer, can require him, *as such officer*, to levy upon goods apparently the property of a stranger, but claimed to be the goods of the defendant in the suit. The officer as such, after indemnity is given him if required, is compelled, as one of his official duties, to make the levy as directed. Such an act widely differs from the mere personal trespass of the officer when he takes the goods of the citizen without process; in the one case, his office, the writ and requirement of the litigant force him to act; in the other the act is voluntary and apparently for his individual, unofficial purposes. The officer in the one case cannot be considered apart from the writ and the party who

commands him to enforce it; in the other he is to be viewed as if he held no office.

So far as the liability of sureties is concerned, there can be no real distinction between acts done by an officer *colore officii* and *virtute officii*. In either case we find a clear, well-defined line drawn between the voluntary, individual acts of the officer and his performances with process, which he is required by his office to enforce.

The distinction made by Justice Pratt, in his dissenting opinion in People vs. Schuyler, 4 Comstock, and by Judge Cowen in *ex parte* Reed, 4 Hill, between acts done "by virtue of office" and under "color of office," is more a fanciful than a real one. The vice of their reasoning seems to be that they make no distinction between a voluntary, private act of the officer, and his employment of process under color of his office, and they lose sight of the fact that every act performed by an officer *with process* is necessarily in some degree official in its nature. Their reasoning, if sound, would often preclude a recovery from sureties by even parties to suits injured by wrongful levy of process directed against them. It might with equal plausibility be said that if a sheriff seizes under execution exempt property of the defendant in a suit, and causes it to be sold under protest of the party, that he performs an unofficial act, and his sureties should not be held liable. And yet neither Justice Pratt nor Cowen goes so far as to say that the officer would not in such case be acting in his official character. The

officer does that which he has no legal right to do in either case. The claim that the sureties are not bound where the goods of a stranger to the writ are taken is not made because he is a stranger, but because the officer is doing a wrongful act, or in other words, committing a trespass. By the seizure of exempt property, he commits a trespass also, and of a like character. Yet the authorities are all one way—that for a seizure of exempt property the sureties are liable, and such liability can alone be created on the ground that the officer performed an official act when seizing it, or seized the property under "color of office."

State vs. Farmer, 21 Mo., 160.

State vs. Shacklett, 37 Mo., 280.

Ohio vs. Jennings, 1 Ohio St., 423.

It cannot be said that in such cases the defendant in the suit, claiming the exemption of the property, has the right to use force in resisting the seizure by the officer; for controversies frequently arise where the claims of exemption are of doubtful validity, and in such event who is to decide? Must the officer refrain from the seizure simply because the execution debtor claims an exemption? If so, the official position of the officer and the process which the law directs him to enforce would be of little benefit generally in the administration of justice, or in the collection of creditors' claims. The debtor would be allowed arbitrarily to determine in his favor his right to the exemption of the

property, and the officer would be forced to abide by such determination.

It is difficult to see how the power given to a sheriff or marshal as such should be so limited. It would be no answer to these authorities to say that while there might be a doubt about the exemption of the property levied upon, he could demand a bond of indemnity from the execution creditor who directed the levy. Such indemnity could be demanded, (Opinion of Mr. Justice Field in Hall vs. Dexter, 3 Sawyer, U. S. Ct. Ct., 435); but if he had not the *official power* to make such a seizure under the process, he could not demand indemnity. In every case the right of the officer to demand indemnity must result from the official nature of the act which he is required to perform. If the act to be performed is a naked trespass without process in his hands, he cannot require protection from the party to the suit who directs him to attempt it. It is, we think, this power to command indemnity, when he is called upon with process to take property which should not have been seized, which, in a large degree, determines the official or unofficial character of his act.

And the same reasoning may with propriety be applied to the seizure of the goods of a stranger to the writ. As against the officer, who by virtue of his office and his process is compelled to act by direction of the execution creditor, the claim of title to the property set up by the third party should not be, at the time of the seizure, sufficient to establish

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State vs. Shacklett, 37 Mo., 280.
Ohio vs. Jennings, 4 Ohio St., 423.

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such title; and if such claim, at that stage of the controversy, is not sufficient, the officer occupies a different attitude from that of a mere naked trespasser who may be lawfully resisted.

It seems to be conceded by counsel for defendants, that as between parties to the action, the officer acts officially. In their brief filed below, they say: "*With the parties to the action the process established official relations,* and created rights and obligations, and for any default or error in exercising the rights or discharging the obligations to the injury of either, the officer must answer in his official capacity."

In the cases cited, where property was claimed as exempt, the officer by this concession necessarily acted officially and was officially responsible, although his legal right to seize the property did not exist. He had no more right to seize such property, if it was in fact exempt, than he had to take the property of a stranger to the writ; and it would seem to follow as a necessary conclusion, that the act would be official in the one case as well as the other.

It is not, however, the *status* of the person whose property is seized which alone determines the character of the act, but the process under which the officer assumes to act and which he is directed to enforce by the creditor or plaintiff in the action is to be considered; and the concession which counsel have made only serves to present in a stronger light the true distinction to be made

between acts of a purely individual nature performed by persons in office and those acts which are done with process, either by virtue of, or under color of office. The individual trespasses the person is alone responsible for; the acts of the other class are inseparably connected with and pertain to his office, and they are never performed except with process.

The learned judge in *ex parte* Reed, the dissenting opinion in People vs. Schuyler, and State vs. Conover, 28 New Jersey L. R., failed to note this vital distinction, and they arrived at their erroneous conclusions by confounding acts performed *colore officii* with the mere individual torts of the officer.

The New Jersey case furnishes no reasons in addition to those offered by Justice Pratt, to show that the officer is not liable on his bond in such cases. The opinion assumes that acts done under "color of office," are unofficial in every sense of the word, and we are given several English cases which the Court maintains support that assumption. These cases do not touch the question, whether acts done *colore officii* are of that unofficial nature which would preclude a recovery from the sureties on an officer's bond. The only question disposed of in those cases was one of limitation arising under a statute, and the question of liabilty for official acts was not involved. And the same may be said of Seeley vs. Birdsall, 15 Johns., which makes a distinction between acts performed *colore*

officii and *virtute officii*, but does not determine that all acts performed *colore officii* are to be regarded as unofficial and purely individual.

It is said by counsel that the crucial test whether the levy made in this case is to be regarded as the individual, instead of the official, act of the marshal, is the right to resist the officer.

They suggest: "*It is not too much to say that the proposition here asserted, in respect to the right of resistance, is the vital point of the controversy.*"

If this be so, the reasoning of Pratt, J., in his dissenting opinion, cannot be considered consistent. The learned judge admits that the law compels the officer to act with the process, by taking and detaining the goods of the stranger, if he, the officer, is given indemnity by the plaintiff in the action who causes the writ to be issued. On page 105 of the opinion he says: "Now, what duty has he violated? or what negligence or misconduct has he been guilty of? An attachment has been delivered to him, under which he proceeded to levy on some property supposed by him to belong to the defendant in the execution. The relator interposed a claim of title; the sheriff summoned a jury to try the validity of such claim, and they found the property in the relator. A sufficient indemnity was then tendered to him by the plaintiff in the attachment, and the sheriff thereupon detained the property. In all this the sheriff followed the express directions of the statute. Had he deviated from these directions, he would clearly have departed

from his *duty*, and made himself and sureties liable to an action."

Now, if it was his *duty* to take the relator's goods after indemnity tendered to him, can it be even plausibly asserted that the act of taking is the naked individual trespass of the officer? That which the law imposes upon him as a *duty* must be performed in his official character, and not otherwise. In his office it requires him to perform no individual acts. Is it not, then, illogical to insist that it is his duty as an officer to take the property at the command of the plaintiff, but that in the act of taking he may be forcibly resisted by the stranger to the suit? That law would be absurd which would, on the one hand, command an officer to do an act, while, on the other, it gave to any citizen the power to oppose with force its performance.

But if we assume that this question of the right to resist the officer is the vital one here, we cannot agree with the able counsel for defendants when they assert "that lawful resistance can be made in such cases; that such rule has been definitely settled, and that no authority, other than the New York and California cases (People vs. Schuyler and Van Pelt vs. Littler), can be found to the contrary." The case of Elder vs. Morrison, 10 Wendell, which they cite, is in point, but it is sufficient to say of it, that the later case of People vs. Schuyler, 4 Comstock, in the same State, virtually overrules it; and in that case—Elder vs. Morrison—Chief Justice Savage refers to no English or American decis-

ion on the point to sustain it. The same may be said of the Massachusetts case, Commonwealth vs. Kennard, 8 Pick. If the right to resist the officer is the vital question, then that case has been practically overruled by subsequent decisions of the same Court, where it has been held that the sureties on the officer's bond are liable for a seizure by him of the goods of a stranger; and those cases cite and approve the decision in People vs. Schuyler.

Inhabitants of Greenfield vs. Wilson et al.
15 Gray, 384.

Tracy vs. Goodwin, 5 Allen (Mass.), 409.

The only remaining case cited by counsel on this point is that of Alcock vs. Andrews, 2 Esp., which we have not had an opportunity of examining.

In addition to the California and New York cases, several decisions have been rendered in Vermont and New Hampshire, denying the right of the stranger to the suit to resist the officer.

State vs. Downer, 8 Vt. 424.
State vs. Muller, 12 Vt. 437.
Merritt vs. Miller, 13 Vt. 416.
State vs. Buchanan, 17 Vt. 573, and
State vs. Richardson, 38 N. H., 208, 211.

It would seem that the weight of authority on this point is against the conclusion arrived at in 10 Wendell.

* * * * * * *

But it is further insisted by Mr. Justice Pratt,

"that there could be no breach of the condition of the bond, when the officer in levying on the property of a third party is only obeying the laws, and performing his duty to the plaintiff in the action, who has given him indemnity; that it cannot be said that he is 'unfaithful,' or is guilty of misconduct when he does the act which the statute requires of him; that in performing such act he has fulfilled the covenant of the bond instead of breaking it."

In indulging in these reflections the learned Judge loses sight of the fact that the official *duty* performed in such case *is confined to, and is for the benefit of the moving party, the plaintiff in the action, who requires him to make the levy. That which is official duty, when the plaintiff's requirement is considered, becomes official misconduct, when the rights of the stranger, whose goods are wrongfully taken, are on the other hand considered.*

By the acceptance of the indemnity offered in such case, the officer undertakes with process to do a wrong which, for the plaintiff and the purposes of the suit, the law apparently permits him to do, and the indemnity bond given is to protect both himself and the sureties on his official bond, in the event they are compelled to respond in damages for the commission of such wrong.

And just here, if considerations of public policy are of any value in determining this question, it is apparent that the sureties on the bond should be liable; the officer, in every case of this nature which

may arise, having the power to protect his sureties by bond made by the litigant who requires him to use the process of the Court to commit a trespass or perpetrate a wrong. If the officer and sureties can thus be completely protected, there can be no good reason why the citizen, whose property he wrongfully seizes, should not be equally protected. The damages which he and his sureties may be compelled to pay in such cases would always be restored by the execution or attaching creditor and his sureties on the indemnity bond. Thus every right of all parties interested would be protected, and the burden of the wrong would ultimately rest, where it should, on the litigant who caused the issuance of the process. The construction of the covenants of officers' bonds, contended for by counsel for defendants, would leave innocent strangers to the litigation at the mercy of the officer and the litigant. Whilst the officer could protect himself and sureties by indemnification, the stranger, who has lost his property without fault upon his part, would be left to seek redress for the injury against persons often wholly irresponsible.

II.

Passing from the examination and criticism of the reasons advanced in the few decisions cited by counsel to show that the sureties are not liable in such cases, we, with great confidence, assert that the weight of authority in this country is adverse to that view. In England the question has not

arisen, because high sheriffs there have not been required to give security to the public for the faithful performance of their duties. The only decided cases in that country which may be said to furnish an analogy are those where the under-sheriffs and their sureties have been held liable for their tortious acts performed under color of office.

If those cases are of any value in the determination of the question involved here, the least that can be said of them is, they tend to support rather than oppose the conclusion reached in the majo.ity of American decisions.

The only authority cited by counsel, in addition to the 28 New Jersey case and the overruled decision of *ex parte* Reed, 4 Hill, are

Garber vs. Ackley, 32 Wis.
Same case, 37 Wis.
State vs. Land, 8 Iredell.
State vs. Brown, 11 Iredell.
Governor vs. Hancock, 2 Ala.
Jenkins vs. Lemonds, 29 Ind.
Clarey vs. State, 34 Ind.; and
Brown vs. Mosely, 11 Smeeds & Marsh.

The question is not decided in 32 Wisconsin, and in 37 Wisconsin the Court gives no reason for its conclusion, but simply relies upon the dissenting opinion of Justice Pratt in People vs. Schuyler.

The cases cited from Indiana cannot be regarded of value, because they fail to mention or consider any of the authorities bearing on the question.

The distinction claimed to exist between acts performed by an officer, *colore officii* and *virtute officii*, was not regarded in either of those cases. Besides, if they are to be urged as authority on the question, they are greatly weakened by a decision in the same State (State vs. Druly, 3 Ind. 431), where it is held, that if the act done by the officer is performed under *color of office*, his sureties are responsible. This decision appears never to have been overruled by the Indiana Court.

The North Carolina cases (8 and 11 Iredell), seem to determine the question. They, however, furnish no reasons to sustain them which cannot be found in the authority in 28 New Jersey, and they appear not to have been well considered. The learned judge who delivered the latter opinion (State vs. Brown, 11 Ired.), appears to have been ignorant of the existence, at the time of its announcement, of numerous decisions in other States expressing a contrary view. He says: "We have not been able to find any case in which the sureties of a sheriff have been held responsible for a trespass committed by their principal, and we have looked with much care. *The books are full of cases where sheriffs have, under an execution against one man, taken the goods of another; but in no instance have the sureties been held responsible.*"

It is to be regretted that the Court in its opinion failed to call our attention to the "books full of such cases." In fact, but one decision had been rendered prior to the time State vs. Brown was

decided (1849), which denies liability in such cases. That was the case of *ex parte* Reed, 4 Hill, a decision which does not appear to have been referred to or relied on by the learned judge. Prior to 1849, the Appellate Courts of several States had determined that the sureties on such bonds were liable in such cases. As early as 1812, the decision of Cormack vs. Commonwealth, 5 Binney (Pa.), had been rendered, and Brunott vs. McKee, 6 Watt. and Serg., in the same Court, was decided in 1843. The case of Archer vs. Noble, 3 Greenleaf (Me.), was determined in 1825, and Harris vs. Hanson, 11 Me., by the same Court, in 1834. The case of Commonwealth vs. Stockton, 5 Mon. (Ky.), was decided in 1842, and Lowell vs. Parker, 10 Metc. (Mass.), in 1845. These cases are directly in point, and were all published prior to the determination of the North Carolina cases cited.

Such eminent jurists as Chief Justice Shaw had prior to that time, determined the question. We quote his language in Lowell vs. Parker: "It is objected in the present case that the sureties are not liable, because the constable undertook to make an attachment on a writ in which the *ad damnum* exceeded $70, and which, therefore, he had no authority to serve; but we think the objection cannot be sustained. He was an officer, had authority to attach goods on mesne process, on a suitable writ; professed to have such process, and thereupon took the plaintiffs' goods; that is, the

goods of Bean, for whose use and benefit this action is brought, and who, therefore, may be called the plaintiff. He, therefore, took the goods *colore officii*, and though he had no sufficient warrant for taking them, yet he is responsible to third persons, because such taking was a breach of his official duty."

The case of Governor vs. Hancock, 2 Alabama, we have not had the opportunity to examine. It is sufficient to say that the decision of Brown vs. Mosely is not in point; nothing said in it has the least bearing on the point to be disposed of here. It may with truth be said that none of these cases are valuable, either for the logic they contain, or the authorities they cite, in assisting this Court to arrive at a correct determination of the question. The 28 New Jersey case but reiterates the arguments made in the dissenting opinion in People vs. Schuyler, and the remainder are of less value than such dissenting opinion.

Opposed to these authorities are the following, all of which are directly in point:

Van Pelt vs. Littler, 14 Cal., 194.
Bulware vs. Craddock, 30 Cal., 190.
Strunk vs. Ochiltree, 11 Iowa, 158.
Charles vs. Hawkins, 11 Iowa, 329.
Archer vs. Noble, 3 Greenleaf (Maine), 418.
Harris vs. Hanson, 11 Maine (2 Fairf.) 241.
City of Lowell vs. Parker, 10 Mete. (Mass.), 389.
Greenfield vs. Wilson, 13 Gray (Mass.), 384.
Tracy vs. Goodwin, 5 Allen (Mass.), 409.

People vs. Schuyler, 4 N. Y. (4 Comst.) 173.

Ohio vs. Jennings, 4 Ohio St., 410.

Cormack vs. Commonwealth, 5 Binn. (Pa.). 186.

Brunott vs. McKee, 6 Watts & Sergt., 513.

Hollman vs. Carroll, 27 Texas, 23.

Sangster vs. Commonwealth, 17 Gratt. (Va.), 124.

Forsyth vs. Ellis, 4 J. J. Marsh, (Ky.), 299.

Commonwealth vs. Stockton, 5 Mon. (Ky.), 182.

Jewel vs. Mills, 3 Bush (Ky.), 62.

State vs. Moore, 19 Mo., 369.

State vs. Farmer, 21 Mo., 160.

State vs. Shaklett, 37 Mo., 280.

State vs. Fitzpatrick, 64 Mo., 185.

State vs. Druly, 3 Ind., 431.

Kane vs. Union P. R. R., 5 Neb., 105–107, 108.

Fox vs. Meacham, 6 Neb., 534–5; and

Drake on Attachment, 6 Ed. Sec. 196, and cases cited.

In all these cases the seizure of the property by the officer *colore officii* was pronounced a breach of official duties which rendered the sureties liable. Decisions so numerous, rendered by many of the ablest Appellate Courts in the country, and by whom the question has been thoroughly considered, should be regarded conclusive. The reasons

given to support them are aptly and tersely expressed by Chief Justice Thurman in Ohio vs. Jennings, where he says: "The authorities seem to us quite conclusive, that a seizure of the goods of A. under color of process against B. is *official misconduct* in the officer making the seizure, and is a breach of the condition of his official bond, where that is that he will faithfully perform the duties of his office. The reason for this is *that the trespass is not the act of a mere individual*, but is perpetrated *colore officii*. If an officer, under color of a *fi. fa.* seizes property of the debtor that is exempt from execution, no one, I imagine, would deny that he had thereby broken the condition of his bond. Why should the law be different, if under color of the same process he take the goods of a third person? If the exemption of the goods from the execution in the one case makes their seizure official misconduct, why should it not have the like effect in the other? True, it may sometimes be more difficult to ascertain the ownership of goods than to know whether a particular piece of property is exempt from execution; but this is not always the case, and if it were, it would not justify us in *restricting to litigants* the indemnity afforded by the official bond, thus leaving the rest of the community with no other indemnity against official misconduct than the responsibility of the officer might furnish."

What counsel in their argument of this question have said concerning the proper averments in a

pleading against an officer and his sureties, need not be considered, if, as we maintain, the Marshal was acting officially, and not merely as an individual, when he seized the property of Henry Feusier. The complaint charges him with official misconduct in the performance of that act.

If the authorities which are cited by us correctly state the law, the averment is necessary, and his defense and that of his sureties, if any they have, would be that the title to the property was vested, at the time of the seizure, in the defendant in the suit, E. D. Feusier.

Counsel have said, "That it is with great diffidence that they have attempted to add anything by way of argument to what they deem the masterly discussion of this subject by the minority of the Court of Appeals of New York, and by the Supreme Court of New Jersey."

In conclusion, we must express an equal, if not a greater degree of diffidence in endeavoring to add anything to what has been so ably said in the masterly *majority* opinion of the first named Court, and in the numerous decisions which support its conclusions.

Respectfully submitted,

M. N. Stone

Counsel for Defendants in Error.

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 826.

THE SWIFT AND COURTNEY AND BEECHER COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED FEBRUARY 10, 1883.

SUPREME COURT OF THE UNITED STATES.

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1 In the Court of Claims.

THE SWIFT AND COURTNEY AND BEECHER COMPANY
versus
THE UNITED STATES. } No. 11,981.

I. *Amended petition. Filed May* 6, 1879, *by leave of court, as a substitute for the original petition filed January* 20, 1879.

Your petitioner, the Swift & Courtney & Beecher Company, respectfully represent that it is a corporation incorporated and organized in the year 1870, under and in accordance with the laws of the State of Connecticut.

That it was, on the 1st day of May, A. D. 1870, and since then continuously has been the proprietor, manufacturer, and vendor of friction-matches, of peculiar value at various places in the United States, with one of its principal offices at Wilmington, in the State of Delaware.

That, as said proprietor and manufacturer, at the beginning of its said business, it furnished to the Commissioner of Internal Revenue its own die for stamps, to be used especially for its own proprietary articles aforesaid. Petitioner further says that in the act of Congress of July 4, 1862, 12 Statutes, 477, it was enacted as follows: "That any proprietor or proprietors of articles named in Schedule C, who shall furnish his or their own die or design for stamps, to be used especially for his or their own proprietary articles, shall be allowed the following discount, viz: on amount purchased at one time, if not less than fifty nor more than five
2 hundred dollars, five per centum on amount, over five hundred dollars ten per centum." Petitioner says that friction matches were named in said Schedule C. Petitioner further says that the above was re-enacted March 3, 1863, 12 Statutes, 718, with the exception that the word "discount" was changed to "commissions," and that said enactment of 1863 was re-enacted June 30, 1864, 13 Statutes, 294, and that it was further provided in said act of 1864, "That the Commissioner of Internal Revenue may from time to time furnish, supply, and deliver to any manufacturer of friction or other matches, cigar-lights, or wax-tapers a suitable quantity of adhesive or other stamps, such as may be prescribed for use in such cases, without prepayment therefor, on a credit not exceeding sixty days, requiring in advance such security as may be judged necessary to secure judgment therefor to the Treasurer of the United States within the time prescribed for such payment."

Petitioner further says that said enactment of June 30th, 1864, was re-enacted July 14th, 1870, 16 Statutes, 257, with the exception that the words, "On amounts over five hundred dollars, ten per centum," were changed to the following: "On amounts over five hundred dollars, ten per centum on the whole amount purchased,"

and that said latter enactment is incorporated into section 3425 of the Revised Statutes of the United States, excepting that the schedule containing friction-matches is called "A" instead of "C."

Petitioner further says that from time to time during said period, to wit, from the 6th day of May, 1870, to the 24th day of December, A. D. 1878, and continuously on different days of each and every month of said period, it sent to the Commissioner of Internal Revenue sums of money ranging from one thousand to ten thousand dollars, as suited its convenience, and that said commissioner transmitted to it stamps, as aforesaid, as needed and ordered by petitioner; so that in the account between petitioner and said commissioner as to said stamps, the creditor side showed moneys received by said commissioner in certain sums and at cer-
3 tain dates, but showed the receipt of no sum less than one thousand dollars, and the debtor side of said account showed that stamps, as aforesaid, were sent by said commissioner to petitioner, generally in different sums and at different dates, but never in amounts less than one thousand dollars.

Petitioner further says that the whole amount of stamps purchased by it, as aforesaid, during said period was of the face value of $3,900,395, and that the whole amount of stamps purchased by it, as aforesaid, prior to the 20th of January, 1873, were of the face value of $760,100.

Petitioner further says that the whole amount of money paid by it to said commissioner, as aforesaid, for said stamps was $3,592,912.81, and that the amount of money paid, as aforesaid, prior to January 20, 1873, was $614,000.

Petitioner further says that allowances were made to it during said period by said commissioner of stamps at their face value amounting to $1,195.92 for other stamps destroyed, and also an amount of $1,995 face value of stamps returned.

Petitioner further alleges and claims that, under and by virtue of the statutes aforesaid, it became and is entitled to receive $389,720.40 as commissions upon its purchase of stamps aforesaid, but avers that said commissioner has refused to allow the same, and has allowed petitioner only in stamps at their face value $354,291.27 as such commissions, $61,400 of which was allowed prior to June 20, 1873.

Petitioner further says that before the commencement of this suit it demanded payment of said commissioner of the whole amount of commissions claimed, to wit, $389,720.40, but that the said commissioner refused to pay the same, or any part thereof, excepting the sum of $354,291.27, as aforesaid, declaring that he would adhere to the long-established practice of his office until there was some legislation or judicial decision to change it; and petitioner says that the allowances made to it from time to time between May 6, 1870, and December 24, 1878, have been in accordance
4 with the uniform practice of said Internal Revenue Office

from its organization, but petitioner avers that at different times prior to 1866, protests were made to the Commissioner of Internal Revenue by and on behalf of the manufacturers of friction matches against such a construction of the statutes by him, by which only ten per cent. commissions in stamps at their face value were allowed by him upon the amount of money paid by the purchasers, instead of ten per cent. upon the whole amount of stamps purchased, and that such facts are and have always been known to petitioner.

Petitioner further says that, on the day of , it gave the required security for a credit of sixty days upon its purchase of stamps, as aforesaid, or provided for in said statutes, which said security was accepted by the proper officer, and remains in full force and effect.

Petitioner further says, that no transfer of said claim, or any part or interest therein, has been made.

Petitioner further says that, after allowing all just credits and offsets, it is justly entitled to recover from the United States said sum of $35,429.13, and that it believes the facts set forth in the foregoing amended petition are true; wherefore petitioner prays judgment against the United States for the said sum of $35,429.13 and costs of suit.

THE SWIFT & COURTNEY & BEECHER COMPANY,
By its attorney, GEO. H. WILLIAMS.

DISTICT OF COLUMBIA, } *ss.*
WASHINGTON CITY, }

George H. Williams, being duly sworn, says: That he is the attorney for the petitioner in the above entitled suit, and signed the foregoing amended petition as such, and to the best of his knowledge he believes said amended petition is true.

GEO. H. WILLIAMS.

Sworn to and subscribed before me, this 6th day of May, 1879.

[SEAL.] JOHN RANDOLPH,
Asst. Clk. Ct. of C.

(Indorsed:) In the Court of Claims. The Swift & Courtney & Beecher Company vs. The United States. No. 11981. Amended petition. Geo. H. Williams, atty. for petitioner.

File as a substitute for the original petition.

W. A. R., *Judge, &c.*

Filed May 6, 1879. J. R.

5 II. *Demurrer to amended petition. Filed May* 12, 1879.

And the said defendants, by their Attorney-General, say that the amended petition is not sufficient in law.

THOMAS SIMONS,
Assistant Attorney-General.

III. *Argument of case upon demurrer.*

And now, to wit, May 19, 1879, the demurrer to the petition in this case was argued by Mr. Blair for the defendants for the demurrer, and Mr. Williams opposed and submitted.

6 IV. *Opinion of the Court on demurrer.*

Richardson, J., delivered the opinion of the court:

The claimant corporation in this case was a manufacturer and proprietor of friction-matches from May, 1870, to the time of bringing its action, and during that time purchased of the defendants a large amount of proprietary stamps for which it furnished its own dies and designs, each purchase being in amount greater than $500. By the provisions of the act of July 14, 1870, ch. 255, § 4 (16 Stat., 257), and Revised Statutes, § 3425, the claimant became entitled to a commission of 10 per cent. on the whole amount purchased.

The controversy between the parties which gives rise to this action relates wholly to the manner of calculating the commission.

The act of July 4, 1862, ch. 119, § 102 (12 Stat., 477), which first established taxation by stamps as part of the internal-revenue system for raising money to carry on the war for the suppression of the rebellion, authorized the Secretary of the Treasury to sell stamps, and to allow and deduct from the aggregate amount the sum of not exceeding 5 per cent. as commission to collectors, postmasters, stationers, or other purchasers, provided that the proprietor of any proprietary articles, among which were friction-matches, should be allowed a discount on amounts purchased at one time of not less than $50 nor more than $500, 5 per cent., and on amounts over $500, 10 per cent.

The first official circular issued by the Commissioner of Internal Revenue promulgating regulations in regard to revenue-stamps was on the 12th of January, 1863, and contained this provision:

The following commission, *payable in stamps*, will be allowed:

On purchases of $50 or more, 2 per centum.

On purchases of $100 or more, 3 per centum.

On purchases of $500 or more, 4 per centum.

On purchases of $1,000 or more, 5 per centum;

and the words *payable in stamps* were in italics. (Boutwell's Direct and Excise Tax System of the United States, A. D. 1863, p. 391.)

Stamps were not only used for the payment of commissions, but they were paid at their full value without discount or commission

thereon. They were put up in packages; package for which the purchaser paid $50 contained stamps to the face value of $51; a $100 package contained $102 in stamps, and so on. This regulation applied in terms only to such stamps as the Secretary of the Treasury was authorized to sell at such discount as he might allow, not exceeding the limit fixed by statute, and as to them it was clearly legal, since it reduced the commissions in each case slightly below the maximum; that is, to the extent of the discount on those paid as commission.

But the Treasury Department applied the same rule in the sale of proprietary stamps for which purchasers furnished their own dies and designs, and allowed and paid in stamps at their face value the 10 per cent. commission allowed by statute, which the Secretary had no authority to reduce, instead of allowing the commission on the whole amount received, as now claimed. The difference is equal to 10 per cent. in money on the stamps delivered at their face value as commissions.

This rule thus applied has been uniformly acted upon from the passage of the first stamp-act in 1862 to the present time, and has been acquiesced in by dealers in proprietary articles until the present action was instituted in May, 1879. More than forty millions of dollars have been collected of other parties for stamps sold in accordance therewith. Congress has several times revised and reenacted the statute on which it is founded, and with a full knowledge, we may presume, of the construction adopted by the Treasury Department, has made no enactment to change it.

Under these circumstances, whatever may be our opinion of the application of the rule in the first instance to the sale of proprietary stamps for which the proprietors furnished dies or designs, we do not feel authorized to reverse it at this late day. In reaching this conclusion we follow the principle laid down by the Supreme Court in Mrs. Alexander's case (12 Wall., 177, and 76 C. Cl., 265), and in Pugh's case recently determined (98 U. S. R., —), and by this court in Hahn's case decided at the present term.

The demurrer is sustained and judgment must be entered thereon dismissing the claimant's petition.

7 V. *Judgment of the Court.*—May 26, 1879.

At a Court of Claims held at the Capitol, in the city of Washington, on the 26th day of May, A. D. 1879.

Judge Richardson read the opinion of the court, and it was ordered that the demurrer filed by the defendants herein be sustained and the petition be dismissed.

VI. *Application for and allowance of an Appeal.*

And now comes the said claimant and prays for an appeal from

the judgment of said court rendered May 26, 1879, in the above-entitled case, in the Supreme Court of the United States.

GEO. H. WILLIAMS,
Atty. for Claimant.

Filed July 30, 1879.

AT CHAMBERS.

Allowed.

C. D. DRAKE, *Chief Justice.*

8 VII. *Minute of the certificate of former record on appeal.*

The foregoing transcript of pleadings, of the opinion of the court, of the judgment of the court, of the application for and allowance of appeal, were duly certified up to the Supreme Court of the United States on the 27th day of September, A. D. 1879, as the record on appeal in this cause.

JOHN RANDOLPH,
Asst. Clerk Court of Claims.

9 *Mandate of the Supreme Court of the United States reversing the judgment and remanding the case to the Court of Claims for further proceedings.*—Filed April 27, 1882.

UNITED STATES OF AMERICA, *ss.*

The President of the United States of America to the
[SEAL.] Honorable the Judges of the Court of Claims, greeting:

Whereas, lately, before you or some of you, in a cause between the Swift and Courtney and Beecher Company, claimant, and the United States, defendant, wherein the judgment of the said Court of Claims, entered in said cause on the 26th day of May, A. D. 1879, is in the following words, viz:

"Judge Richardson read the opinion of the court, and it was ordered that the demurrer filed by the defendants herein be
10 sustained and the petition be dismissed."

As by the inspection of the transcript of the record of the said Court of Claims, which was brought into the Supreme Court of the United States by virtue of an appeal, agreeably to the act of Congress in such case made and provided, fully and at large appears;

And whereas, in the present term of October, in the year of our Lord one thousand eight hundred and eighty-one, the said cause came on to be heard before the said Supreme Court on the said transcript of record, and was argued by counsel:

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said Court of Claims in this cause be and the same is hereby reversed.

And it is further ordered that this cause be, and the same is

hereby, remanded to the said Court of Claims for further proceedings to be had therein in accordance with law.

17TH APRIL, 1882.

11 You, therefore, are hereby commanded that such further proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Hon. Morrison R. Waite, Chief Justice of said Supreme Court, the 26th day of April, in the year of our Lord one thousand eight hundred and eighty-two.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

12 IX. *Traverse of Petition.*—Filed May 6, 1882.

And now comes the Attorney-General, on behalf of the United States, and, answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

THOMAS SIMONS,
Asst. Attorney-General.

13 X. *Plea under Section 1069 Revised Statutes.*—Filed June 8, 1882.

The Assistant Attorney-General, on behalf of the United States, comes and, for a further plea, says that so much of the alleged claim as is for commissions upon stamps purchased prior to the 20th January, 1873, to wit, of the face value of $760,100, is forever barred, because the petition setting forth a statement thereof was not filed in the court, nor was the same transmitted to the court by the Secretary of the Senate or the Clerk of the House of Representatives, as provided by law, within six years after claim for the same first accrued.

THOMAS SIMONS,
Assistant Attorney-General.

14. XI. *Plea under Section 3228 Revised Statutes.*—Filed October 14, 1882.

The Assistant Attorney-General, for a further plea on behalf of the United States, says that as to so much of the alleged claim as

(Office Form 113—Stamp Division.)

Invoice of documentary and proprietary stamps.

Treasury Department,
Office of Internal Revenue,
Washington, [date.]

Swift & Courtney & Beecher Co.

Gentlemen: I have this day forwarded to you by express United States internal revenue private-die stamps of the face value of thirty-three hundred dollars [or a sum equal to the amount of, and ten per cent. commission on, the amount of money specified in the order], in satisfaction of Order No. ——.

When the stamps come to hand they should be carefully counted in the presence of a disinterested witness, and if the invoice is found correct you will date, sign, and transmit to this office by first mail the inclosed receipt.

If the stamps fail to come to hand within a reasonable time please notify this office.

Very respectfully,
—— ——, *Commissioner.*
—— ——, *Chief of Stamp Division.*

3. The receipt referred to in such letter was prepared and filled up by the commissioner, except the date and signature, forwarded to the claimant corporation, and by it signed and returned to the office of the internal revenue bureau, and was in the following form:

(Office Form No. 44—Stamp Division.)

Receipt for documentary and proprietary stamps.

SIR: Your letter of the —— has been received. I am also in receipt of the United States internal revenue stamps therein
17 referred to, amounting to thirty-three hundred dollars [or a sum equal to the amount of, and ten per cent. commission on, the amount of money specified in the order], in satisfaction of my order under date of ——.

I am, very respectfully,

THE SWIFT & COURTNEY & BEECHER CO.
L. S. BENTON, *Att'y.*

To Commissioner of Internal Revenue,
Washington, D. C.

No. —. 3,000.

NOTE.—This receipt should be signed and forwarded to Washington by first mail. The signature should be legally and technically correct, so as to bind the person, firm, or corporation ordering and receiving the stamps.

4. The claimant throughout availed himself of the credit provided for by statute. No order for stamps was ever for a less quantity than $500 of face value. Remittances of money in payment were made in various sums from time to time within the sixty days' credit. Each remittance was for a sum not less than $500, did not specify and correspond to any one particular and specified order for stamps, but did apply to orders the times for payment of which were near maturity.

The remittances were so made that all stamps received were thus paid for at or before the expiration of term of credit allowed.

The claimant was always indebted to the defendants for stamps received within the past sixty days, the time for payment for which had not matured, but was never indebted for any stamps received more than sixty days previous.

5. Remittances of money and acknowledgments of receipt thereof were made in the following forms:

The Swift & Courtney & Beecher Co.,
[Date.]

Hon. Green B. Raum,
Com. Inter. Revenue, Washington, D. C.:

Dear Sir: Enclosed please find Asst. Treas. ——— C. D. [certificate of deposit] No. 39 for two thousand five hundred ($2,500) dollars [or other sum], which pass to our credit.

THE SWIFT & COURTNEY & BEECHER CO.,
———, *Manager.*

(Official Form 80.)

Authority to take credit on Form 55½.

Treasury Department,
Office of Internal Revenue,
[Date.]

Swift & Courtney & Beecher Co.,
Philad'a, Pa.:

Sir: The following credit has this day been given you on the books of this office on account of internal-revenue adhesive stamps, viz:

By duplicate certificate of deposit No. 39 of the Asst. Treas. ———, dated ———, for	$2,500
Commission @ 10 per cent.....	$250
Total.....	$2,750

You are hereby authorized to take credit for the above amount on Form 55½ for the current month.

Very respectfully,

_____,
Commissioner.

6. In compliance with directions thus given by the Commissioner and with Form 55½ the complainant made its first return July 8, 1870, and regularly thereafter each month during the whole period. These returns, with like statements in gross made by the Commissioner, were forwarded by the latter to the Auditor of the Treasury, and accounts thereon were from time to time stated by him, 18 and transmitted to the First Comptroller, by whom the balances found due were certified in the manner that accounts are adjusted and settled in the Treasury Department.

7. From the commencement the Commissioner of Internal Revenue held that the amount allowed by statute was to be computed as commissions upon the amount of money paid; and all business between the parties was transacted, and all accounts were stated and adjusted by the accounting officers, on that basis.

8. The blank forms of 55½ were furnished by the commissioner to the claimants, who filled them up and returned them in accordance with the commissioner's directions and decision.

9. The first return thereon in which commissions were stated was as follows:

(55½)

The United States in account current with the Swift & Courtney & Beecher Co. of Wilmington, Del., for the month ending July 31st, 1870, under official bond dated _____, *for $60,000.*

To cash deposited as per certificate No. 1421	$10,000	By balance from last month...	16,475
Commission, per c't on same.....	1,000	" stamps rec'd on order dated July 30th.....	5,475
Bal. due United States.....	10,950		21,950
	$21,950		

The above account is complete and true.
Dated August 9, 1870.

(Signed) THE SWIFT, COURTNEY & BEECHER CO.
By WM. H. SWIFT,
Treasurer Match Manufacturers.

10. The first return made before the commencement of this action was as follows:

(55½)

The United States in account current with Swift & Courtney & Beecher Co. of New Haven, Conn., for the month ending Dec'r 31st, 1878, under bond dated Dec'r 14th, 1872, for $150,000.

DR.			CR.		
	To cash deposited, as per certificate:			By balance from last month....	$106,700
				By stamps received on order:	
Dec'r 2	No. 5827 Wilmington.....	$5,000	No. 6676 ag	New Haven.....	2,200
3	5821 Philada.....	2,500	6692	Chicago.....	3,300
3	—— New Haven.....	2,000	6700	Wilmington.....	5,500
6	5834 Wilmington.....	5,000	6704	Philada.....	2,750
9	810 New Haven.....	2,000	6711	New Haven.....	2,200
9	96 Chicago.....	3,000	6721	Wilmington.....	5,500
11	31 Philada.....	2,500	6746	New Haven.....	2,200
13	5840 Wilmington.....	5,000	6745	Chicago.....	3,300
13	815 New Haven.....	2,000	6750	Philada.....	2,750
18	To commission on amount deposited: 821 New Haven.....	2,000	6762	Wilmington.....	5,500
			6768	New Haven.....	2,200
18	103 Chicago.....	3,000	6789	Chicago.....	3,300
20	39 Philada.....	2,500	6793	New Haven.....	2,200
26	5851 Wilmington.....	5,000	6800	Philada.....	2,750
26	109 Chicago.....	5,000			
30	51 Philada.....	2,500			
"	834 New Haven.....	2,000			
	To commission @ 10 per cent..	5,100			
	Balance due United States.....	96,250			
		$152,350			$152,350

The above account is correct, complete, and true.

SWIFT & COURTNEY & BEECHER CO., MATCH MANUFACTURER.
Dated Jan'y 8, 1879. WM. H. SWIFT, *Tr.*

NOTE.—The face value of stamps must always be inserted in the credit side of this account.

19 The monthly intervening returns were in like form as the above.

11. Such returns, with the commissioner's statement coinciding therewith, having been transmitted to the accounting officers, were settled and adjusted from time to time, as was the following account, which is inserted here as a specimen of all:

TREASURY DEPARTMENT, FIFTH AUDITOR'S OFFICE,
July 6th, 1872.

I hereby certify that I have examined and adjusted an account between the United States and The Swift & Courtney & Beecher Co., match manufacturers, internal-revenue stamp agents, at Wilmington, Del., for the quarter commencing Oct. 1st, 1871, and ending Dec. 31st, 1871, and find them chargeable therein, as follows:

Bond { $30,000, dated May 17th, 1870.
{ 50,000 " " 24th, 1870.

To balance due from them per report No. 2939 (Register's certificate).....		39,050 00
To stamps, as per receipt dated in Oct., 1871.....		24,200
" "	" Nov., 1871.....	26,950
"	" Dec., 1871.....	24,200
"	" Jan. 2, 1872.....	1,650
		116,050

I also find them entitled to credit as follows:

No. 2536,	covering warrant		No. 242,	4	quarter,	1871		1,500 00	
No. 1935,	"	"	"	"	"	"	" 1	5,000 00	
No. 2553,	"	"	"	"	"	"	" 1	1,500 00	
No. 1947,	"	"	"	"	"	"	" 1	5,000 00	
" 1957,	"	"	"	"	"	"	" 1	5,000 00	
" 2570,			496,	"	"		1	1,500 00	
" 1973,			"	"	"		1	5,000 00	
" 2583,			"	"	"		1	1,500 00	
" 1982,			"	"	"		1	6,000 00	
" 2594,			"	"	"		1	1,500 00	
" 1995,			"	"	"		1	5,000 00	
" 2608,			"	"	"			1,500 00	
" 1997,			754,	"	"		1	5,000 00	
" 2616,			"	"	"			1,500 00	
2013,			"	"			1	5,000 00	
" 2629,			"	"	"		1	1,500 00	
2014,			"	"				1,000 00	
" 2640,			"	"	"		1	1,500 00	
2025,			"	"				5,000 00	
" 2650,			"	"	"		1	1,500 00	
By ten per cent. commission on amount deposited								6,200 00	
									68,200
Leaving balance due the United States, with which they are to be charged									47,850

As appears from the account and vouchers herewith transmitted for the decision of the Comptroller of the Treasury thereon.

J. H. ELA, *Auditor.*

To the First Comptroller of the Treasury.

TREASURY DEPARTMENT, COMPTROLLER'S OFFICE,
July 16, 1872.

I admit and certify a balance of forty-seven thousand eight hundred and fifty dollars as due the United States, as stated in the foregoing report.

WM. HEMPHILL JONES,
Acting Comptroller.

To the Register of the Treasury.

Notices of such settlements were forwarded to the claimants by mail.

20 IV.

Prior to June 30, 1866, the leading manufacturers of matches, among whom was William H. Swift, who, upon the organization of the claimant corporation in 1870, became one of its large stockholders and treasurer, made repeated protests to the officers of the Internal Revenue Bureau against the method of computing commissions for proprietary stamps sold to those who furnished their own dies and designs.

But it does not appear that any one in behalf of the claimant corporation ever, after its organization, made any protest or objection against the method adopted by the Treasury Department for the computation of such commissions, or made claim to any allowance on account thereof, beyond what had been accorded to them, until January 8, 1879, when the following correspondence took place:

Washington, D. C., Jan'y 8th, 1879.

Hon. Green B. Raum,
Com'r of Int. Rev.:

Sir: I have the honor to state that The Swift & Courtney & Beecher Co. manufacture matches and use their own proprietary stamps. They claim that there is due to them from your office the sum of $35,822.50, as commissions upon stamps purchased as provided in section 3425 of the Revised Statutes. I have the honor to ask on behalf of said Co., and as their attorney, for the payment of said sum due as aforesaid.

Very respectfully,

GEO. H. WILLIAMS.

Treasury Department,
Office of Internal Revenue,
Washington, January 16th, 1879.

Sir: Your letter of the 8th inst., stating that The Swift & Courtney & Beecher Company, manufacturers of matches, claim that there is due them the sum of $35,822.50 as commissions upon stamps purchased as provided in section 3423 of the Revised Statutes, and asking on behalf of said corporation that payment of said sum be made, has been received.

In reply I have to say that The Swift & Courtney & Beecher Company has received all commissions upon stamps to which they are entitled, provided the method of computing commissions, which was inaugurated with the first issue of private-die proprietary stamps, and has been continued by each of my predecessors, is correct.

I have heretofore decided to adhere to the long established practice of the office in this regard until there shall be some legislation or a judicial decision to change it.

In the absence of such legislation or judicial decision the claim made by you in behalf of The Swift & Courtney & Beecher Company is hereby rejected.

Respectfully,

GREEN B. RAUM,
Commissioner.

Geo. H. Williams,
Attorney, Washington, D. C.

V.

From May 6, 1870, to December 24, 1878, the claimant corporation received from the Commissioner of Internal Revenue proprietary stamps, printed from its own private dies, of the face value of three million eight hundred ninety-seven thousand two hundred four dollars ($3,897,204). These were received in fulfillment of more than sixteen hundred orders for different amounts, varying from $500 to $10,000, in form as set forth in paragraph 1 of Finding III.

Each remittance of said stamps exactly covered in face value the amount of, with ten per cent. commission added to, the
21 money specified in an order, and the claimant was notified thereof by letter in the form set out in paragraph 2 of Finding III.

Each receipt of said stamps in reply to said orders was acknowledged by the claimant by a letter, printed blank for which was furnished by the commissioner, and was in form as set out in paragraph 3 of Finding III.

All these stamps so received by the claimant were paid for at or before the expiration of sixty days after their receipt, in manner set forth in paragraphs 5, 6, and 7 of Finding III.

VI.

1. Stating accounts between the parties, for the purposes of this case, at such periods of time as either party considered at the trial to be material, the following facts appear:

Whole face value of stamps delivered from May 6, 1870, to November 21, 1878 (sixty days before action brought)		$3,836,544
Paid for within sixty days after purchase:		
By cash	3,487,767	
By commissions on money paid	348,777	
		3,836,544
Difference between amount of discount at ten per cent. on the face value and the amount actually allowed as commissions on the money paid	34,878	
2. Whole face value of stamps delivered from November 21, 1872, for six years, up to November 21, 1878		3,147,944
Paid for within sixty days after purchase:		
By cash	$2,861,767	
By commissions on money paid	286,177	
		3,147,944
Difference between amount of discount of ten per cent. on face value and the amount actually allowed as commissions on the money paid	28,616	

CONCLUSIONS OF LAW.

Upon the foregeing findings, the court decides as a conclusion of law that the claimant corporation is not entitled to judgment in its favor and that its petition must be dismissed.

XIII. *Opinion of the Court.*

Richardson, J., delivered the opinion of the court:

When this case was first submitted at a former term of the court it was upon demurrer to the claimants' petition, and the single question then considered was whether or not the method of computing commissions on stamps sold to proprietors of matches and other proprietary articles who furnished their dies, adopted and long followed by the Internal Revenue Bureau and the Treasury Department, should be sustained.

Without at that time expressing an opinion as to the correctness of the rule, in passing judgment upon the demurrer, and without then much considering it, but regarding it, if not clearly correct, at least not free from ambiguity and doubt, we felt, on the authority of Mr. Alexander's case (12 Wall., 177) and Pugh's case (99 U. S., 265), that we were not authorized to overthrow a construction of the statute so long acquiesced in by all parties concerned, in transactions of such great magnitude and involving such large pecuniary interests, and we therefore sustained the demurrer.

22 Upon appeal, the Supreme Court, from the course of the argument at the hearing there, and certainly not from any concession ever made by the officers of the internal revenue bureau, or by any other officers of the Treasury Department, regarding it as "virtually admitted that the contention on the part of the appellant [the claimant] upon the provisions of the statutes is correct," held, as has often been held by that court and by this, that "the rule which gives determining weight to contemporaneous construction put upon a statute by those charged with its execution applies only in cases of ambiguity and doubt." Applying the rule to the case as virtually admitted in the Supreme Court, the judgment of this court on demurrer was reversed (105 U. S., 691). It could not have been otherwise under those circumstances, when the contention of the officers of the Treasury Department was thus abandoned.

In point of fact the officers of the internal revenue bureau and of the Treasury Department charged with the execution of the law have always strenuously maintained that the rule adopted by them was in accordance with the will of Congress as shown by the course of legislation.

The first internal revenue act passed July 1, 1862, authorized the commissioner to sell adhesive stamps therein provided for, and to make an allowance to purchasers of not exceeding 5 per cent. as "commission," with a proviso that proprietors of the proprie-

tary articles named, who should furnish their own dies or designs, should be allowed a "discount" of 5 or 10 per cent., according to the amounts purchased. (Ch. 119, § 102, 12 Stats. L., 447.)

The two words commission and discount, are not synonymous. They are similar, but not identical. "Commission," in its technical as well as in its ordinary sense generally signifies a percentage upon the amount of money involved in the transaction, as distinguished from "discount," which is a percentage taken from the face value of the security or property negotiated. (Bouvier's Law Dictionary, under "Commissions," Ficklin's National Arithmetic, 2d Book Advanced, paragraph 356, and other standard mathematical works.)

The Commissioner of Internal Revenue understood that Congress intended to use the two words in their distinct significations, as expressing two distinct methods of allowance. Accordingly, when he issued his first circular, after the bureau was fairly organized, on the 12th of January, 1863, he gave notice that a commission would be allowed on adhesive stamps of 2 per cent. on purchases of $50, 3 per cent. on $100, 4 per cent. on $500, and 5 per cent. on $1,000, payable in stamps. (Boutwell's Direct and Excise Tax System, p. 391.) This language did not artistically express the idea of "commission," but such was its practical effect. A percentage on the face value of stamps, payable in stamps, exactly equals a percentage on the money involved in the transaction, and so is strictly and technically a "commission."

No reference was made in this circular to the sale of proprietary stamps, and it seems to have been understood that Congress intended to apply to them a different rule of allowance. But in less than two months, on the 3d of March, 1863, Congress, by express enactment, changed the word "discount" in the act of 1862, to "commission" by striking out the one and inserting the other, at the same time providing for a uniform commission of 10 per cent. on the whole amount, instead of 5 per cent. on small and 10 per cent. on large purchases. (Ch. 74, 12 Stats. L., 718.)

This change of percentage in the allowance for the purchase of proprietary stamps from "discount" to "commission" certainly appears to have been made for the sole purpose of altering the
23 law and sanctioning the construction given by the commissioner, otherwise it was of no practical effect. If the percentage was to be deducted from the face value of the stamps after the word "commission" took the place of "discount," then it was discount still, and the express alteration of the statute made no change in the law, and was as idle and useless in practical effect as it was inappropriate and inaccurate in language.

Whether or not the whole phraseology of the section of the statute was aptly chosen in every particular to express the correct idea of the commission, it can hardly be conceived that Congress

intended to allow *discount* after having stricken out that word and put in its place one susceptible of a different signification.

The Internal Revenue Bureau and the officers of the Treasury Department very naturally regarded the change in language as effecting a change in the law, and they have ever since allowed purchasers of proprietary stamps, who furnished their own dies, not a "discount" from the face value of the stamps purchased, but a "commission" computed on the amount of money involved in the transaction, and all the dealings of the parties have been in that more accurate form of account instead of by the formula of "payable in stamps," as the findings show.

This construction was acquiesced in by purchasers of proprietary stamps without objection after the year 1866 to near the time of bringing this action.

The decision of this case as it is now before us does not necessarily turn upon the correctness of the practice of the Treasury Department in the method of computing commissions, and we have thus reviewed the subject in order to show that the officers charged with the duty of administering the law from its first enactment to the present time have acted not without reason and due consideration, nor without the apparent sanction of Congress.

Upon the right to recover at the trial on the demurrer the Supreme Court had before it only the petition of the claimant, admitted by the demurrer to be true for the purposes of that hearing. Of this they say, "the case made by the petition is not that of successive and independent purchases of stamps, settled for at the time when the commissions given by the law were paid by the commissioner, the purchaser voluntarily accepting payment, not in money, but in other stamps; and new dealings of the same character, but separate as to each instance, had, afterwards, upon the same footing and by mutual understanding. On the contrary, the business was conducted upon the footing of a running account."

The court further say that the dealing as presented by the petition "does not prove that he [the proprietor] was willing to waive his right to a commission upon the stamps so purchased. And it would be incumbent on the government, in order to deprive him of his statutory right, not only to show facts, from which an agreement to do so might be inferred, but an actual settlement based upon such an understanding."

Since the final decision upon the demurrer, the defendants have had leave to answer over and have filed a plea of general issue, and the real facts have been proved by the parties and found by the court, and we are now called upon to apply to these facts the rules of law laid down by the Supreme Court.

It now appears from these findings that the dealings of the parties disclose a case not only entirely different from, but exactly the opposite to, that implied from the allegations in the petition alone upon which the Supreme Court was then called upon to pass judg-

ment. It is shown that those dealings were successive and
24 independent purchases, upon written orders fulfilled by the delivery of stamps of the face value of 10 per cent. more than the money order; that in each case those stamps were received and receipted for by the claimant *in satisfaction* of the order; that within sixty days each order was paid for on that basis; that there was no running account beyond sixty days' credit, or beyond the monthly settlements which were made on the basis of the orders and correspondence and upon the returns signed by the claimant and forwarded to the commissioner, and that the accounting officers made frequent statements of balances on the same basis.

The Supreme Court say, "it would be incumbent on the government not only to show facts, from which an agreement might be inferred, but an actual settlement based upon such an understanding."

In our opinion the government has now done both. The written contract set forth in the bond (Finding II.) was that the claimant corporation should, on or before the tenth day of each and every month, make a statement of their account upon Form 55½, showing the balance due at the commencement of the month, the amount of stamps received, and the amount of money remitted by it during the month, and the balance due from it at the close of the month next preceding; and also that the company should pay all and every sum or sums of money it might owe the United States for stamps delivered or forwarded to it "according to their request or order, within the time prescribed for payment for the same according to law;" that is, each purchase was to be paid for within sixty days of delivery of the stamps.

The statute fixed a limit to the term of credit for each purchase, and this agreement fixed in addition thereto the terms of settlement, not payment merely, but an accounting between the parties, an accord and satisfaction. So the parties always did their business from the commencement without objection on the part of the claimant for nearly nine years, and until this action was about to be instituted. We will review the course of business.

Each purchase of stamps was upon a written order, separate and distinct from all other purchases. The claimant ordered, say, "three thousand dollars' worth of match stamps," as shown in paragraph 1 of Finding III. The commissioner thereupon forwarded stamps of the face value of $3,300, with a letter stating that they were in satisfaction of the order referred to (paragraph 2 of Finding III.), and the claimant, in writing signed by its proper officer, returned an acknowledgment of the receipt of stamps of the face value of $3,300, in satisfaction of the order for three thousand dollars' worth of stamps. (Paragraph 3 of Finding III.)

These are facts from which an agreement may not only be inferred, but which must be held to constitute an explicit contract, a sale and purchase at a price fixed and agreed upon by the parties.

The course of business subsequent to the delivery of stamps and to the acknowledgment by the claimant, reaffirms the contract as thus understood by the parties. The claimant was to pay for each delivery within sixty days, and so it always did. At the end of each sixty days after the fulfillment of an order that order was invariably paid.

In one sense there was a running account for sixty days; that is, as to terms of payment. After the first order was given, and before the sixty days for payment had expired, there were many intervening orders of like kind. It was not convenient to send a separate remittance of money in payment for each separate delivery of stamps, when, as the findings show, more than sixteen hundred such deliveries were made, and the claimant accordingly made remittance in sums to suit its own convenience, taking care always that full payment should be effected before the term of credit on any one order had expired. If at any time a remittance covered more than was payable at its date, it was practically a payment of what had matured, and the balance went towards payment of the next maturing order. In so large a business the parties did not stop to adjust each transaction separately. But they did settle each month, as we have shown; and such settlements were recognized by the correspondence had upon each remittance of money, as well as agreed upon in the bond, and were regulary made every month throughout the whole period of nine years. In acknowledging each remittance the commissioner gave the claimant credit for the money remitted, with 10 per cent. added thereto as commissions, and authorized it "to take credit for the above amount on Form 55½ for the current month," as shown by paragraph 5 in Finding III.

As to periods of settlement, accord, and satisfaction, we may therefore consider that there was a running account for each period of one month, as appears from the specimen monthly account-current set forth in paragraph 10 of Finding III. These accounts-current were regularly sent forward to the accounting officers, and by them adjusted and balances stated from time to time in accordance with the practice of the Treasury Department, of which the claimant had due notice.

There was not such a general running account between these parties for the period of nine years from the commencement of their dealings as entitles the claimant to a statement of its whole account for that time, opening its own monthly settlements and the settlements of the accounting officers, setting aside its own sixteen hundred contracts, and making to it a greater allowance than was from time to time agreed upon, even if it would have been entitled to such greater allowance had it not otherwise contracted.

In our opinion, under the rules laid down by the Supreme Court in this very case, as well as in the case of Frances E. Pray, decided by that court at the present term, the claimant corporation is con-